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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-422

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

KERR-McGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, AND GETTY OIL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM R. JENTES
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601

HENRY P. MONAGHAN
765 Commonwealth Avenue
Boston, Massachusetts

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Westinghouse Electric Corporation respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in this proceeding on July 25, 1978, and the judgment denying the petition for rehearing and suggestion of rehearing *en banc* entered on August 17, 1978.

OPINIONS BELOW

The opinion of the District Court is reported at 448 F.Supp. 1284 (1978) and appears in the appendix at pages 1-52. The opinion of the Court of Appeals and its judgment denying rehearing are not yet officially reported. They appear in the appendix at pages 53-78.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1978. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on August 17, 1978. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254. *Coopers & Lybrand* v. *Livesay*, ____ U.S. ____ (1978).

QUESTIONS PRESENTED

1. Whether denial of a motion to disqualify counsel is an immediately appealable order, an issue on which there is a conflict among the courts of appeals.

2. Whether the Court of Appeals erred in departing from long-settled holdings in other circuit and state courts that an attorney-client relationship can arise only with counsel's express or implied consent.

3. Whether the Court of Appeals improperly invaded the province of the District Court:

   a. By holding that affidavits, rather than the District Court's findings, are dispositive of contraverted factual issues, and

   b. By substituting its judgment for that of the District Court that disqualification was inappropriate in the circumstances of this case.

STATUTE INVOLVED

28 U.S.C. § 1291 provides in pertinent part:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This petition arises from the motions of the four respondent energy companies to disqualify the law firm of Kirkland & Ellis from representing Westinghouse Electric Corporation in a massive antitrust case alleging an international conspiracy to fix prices, rig markets and boycott Westinghouse in the uranium market. After a careful and exhaustive analysis of the facts and law, the District Court, Marshall J., overruled the motions, concluding that "we come away with the firm conviction that disqualification of Kirkland is a drastic, unjustified, and inequitable resolution of a minor ethical grievance." *Westinghouse Electric Corporation* v. *Rio Algom Limited, et al,* 448 F.Supp. 1284, 1306 (N.D. Ill. 1978); App. 38. The Court of Appeals allowed an immediate appeal under the collateral order doctrine of *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949), and reversed. *Westinghouse Electric Corporation* v. *Kerr-McGee Corporation,* ____ F.2d ____ (7th Cir. 1978); App. 53 *et seq.*[1] The relevant facts are not in material dispute and are readily summarized.

1. *The Antitrust Case.*

On October 15, 1976 petitioner filed the present action against 29 United States and foreign uranium producers, including respondents, alleging a worldwide conspiracy to

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[1] Technically, petitioner was ordered to retain new counsel or to dismiss the suit against the respondents, but the practical effect is to force petitioner to replace Kirkland as its lead counsel.

restrain trade in the uranium industry. The detailed complaint was filed by Kirkland's Chicago office, which had been retained by Westinghouse in May 1975 to conduct a legal and factual investigation of the drastic rise in uranium prices since 1973.

An initial result of that investigation was petitioner's announcement in September 1975 that the unprecedented price rise appeared to be the result of a number of unanticipated contingencies, including a foreign uranium cartel, which made it commercially impracticable for Westinghouse to perform contracts for the supply of uranium to its utility customers. (See Uniform Commercial Code § 2-615). Shortly thereafter, breach of contract actions were commenced by those customers in 13 federal district courts and one state court. Petitioner's potential exposure in those cases runs into the billions of dollars. (448 F.Supp. at 1288, 1305; App. 2, 37).

During the course of Kirkland's extensive discovery efforts in the utility contract litigation, including efforts directed at respondents, it became increasingly evident that the foreign cartel involved a number of United States uranium producers. Further support for this conclusion was provided in August 1976 when the Friends of the Earth released previously secret Australian documents detailing the cartel's worldwide manipulation of the uranium market.

The resulting evidence, which formed the basis for the present action and which has already been presented in preliminary fashion as an element in the utility contract litigation, is impressive. In fact, two courts have already expressed their belief in the substantial character of petitioner's antitrust charges,[2] the Tennessee Valley Authority has filed antitrust

[2] The first utility case tried was in the Court of Common Pleas, Allegheny County, Pa., where the Court observed: "There was persuasive evidence that ... both the price and supply of uranium were drastically affected by ... a conspiracy among United States and foreign uranium producers to fix prices, to allocate markets and to eliminate competition from

(Footnote continued on following page)

complaints based on evidence turned up by petitioner,[3] and the United States government, after subpoenaing petitioner's conspiracy evidence, filed a criminal price-fixing charge to which respondent Gulf Oil Corporation pleaded *nolo contendere* and was fined $40,000.[4]

2. *The Disqualification Motions and The District Court Opinion.*

In January 1977, three months after Westinghouse's antitrust complaint, respondents filed their disqualification motions.[5] The thrust of the supporting affidavits was that Kirkland's Washington office had been retained by the American Petroleum Institute (API) to prepare a report on legislative

(Footnote continued from preceding page)

intermediaries in the uranium market, such as Westinghouse." Final Decree Approving Settlement, *Duquesne Light Co.* v. *Westinghouse Electric Corp.*, No. 75-23978 (1977). Similarly, a federal court in Pittsburgh, involved in discovery of Gulf documents in the contract cases, observed that the evidence established a "prima facie case" of conspiracy and that "the dramatic upsurge in the price of uranium on the American market was the result of coordinated action on the part of the uranium producers." *In re Westinghouse Electric Corp. Uranium Contracts Litigation,* 76 F.R.D. 47, 57 (W.D.Pa. 1977).

[3] *TVA* v. *Rio Algom Corp.,* No. 77-1053 (D. Colo.); *TVA* v. *Rio Algom, Ltd., et al,* No. 77-290 (E.D. Tenn.); *TVA* v. *Urangesellschaft, et al,* No. 77 Civ. 5617 (S.D.N.Y.)

[4] *United States* v. *Gulf Oil Corp.,* Cr. No. 78-123 (W.D. Pa. 1978). Additionally, a New Mexico court has entered a default judgment against Gulf for refusing to produce documents, specifically finding that it "participated in the formation and operation of an international conspiracy and cartel of uranium producers ('the cartel') from at least 1972 to 1975. The purpose and effect of the cartel was to limit supply, control production, allocate markets and fix the price of uranium." *United Nuclear Corp.* v. *General Atomic Co.,* No. 50827 (Dist. Ct. 1st Jud. Dist.)

[5] Thirteen other defendants also filed motions, all of which were denied by the District Court. (448 F.Supp. at 1306; App. 38-39) Only one, Noranda Mines Limited, appealed and the Court of Appeals affirmed. (App. 74-76)

proposals to bar oil companies from uranium and other energy fields; that in connection with that project, respondents had submitted confidential data relating to their uranium operations to Kirkland; and that respondents had been "given to believe" that Kirkland was compiling the information and preparing the report as counsel for respondents as well as API. (448 F.Supp. at 1291-94; App. 7-15)[6] Although not precise, respondents suggested their attorney-client relationship with Kirkland arose in May 1976, a year after the Westinghouse retainer. (448 F.Supp. at 1293; App. 12)

After an exhaustive analysis of the counter-affidavits, the documentary evidence and the controlling precedents, the District Court denied the motions to disqualify. The Court concluded that there was no evidence to support the conclusion that Kirkland had undertaken to act as respondents' counsel; that Kirkland's only clients were Westinghouse and API, neither of which raised a conflict objection; that Kirkland's Washington office had maintained the complete confidentiality of the data it received in the API project; and that the "rigid segregation between the Westinghouse and API attorneys" led

[6] Respondents also contended there was a conflict between Kirkland's ultimate report to API and the present complaint, since the report argued that there was no structural restraint of trade due to oil company participation in the uranium and other energy fields. (448 F.Supp. at 1295-96; App. 16-18) However, the API has never considered the documents to be in conflict (*Id.* at 1297; App. 20), and there is in fact a critical distinction between industry structure (with which the API report was concerned) and individual company conduct (with which this antitrust case is concerned). This distinction is underscored by the fact that the Justice Department recently filed a report concluding that oil company participation in the uranium industry is not structurally anticompetitive, *Competition in the Coal Industry* (May 1978), notwithstanding its almost simultaneous filing of a criminal price-fixing charge against respondent Gulf Oil Corp., *United States* v. *Gulf Oil Corp.*, Cr. No. 78-123 (W.D. Pa., May 8, 1978).

to "the absence of any hint of actual disclosure" to the Chicago office. (448 F.Supp. at 1303, 1305; App. 33, 37). The District Court found in the latter regard:

> Not only did completely different Kirkland attorneys work on the two matters, but the attorneys were segregated between the Washington and Chicago firms. In addition, Kirkland's investigation of antitrust violations by uranium producers was treated as a highly confidential matter, which was not disclosed even within the firm to anyone not directly involved in the Westinghouse matter. Securities law dictated that public disclosure of the possible antitrust lawsuit be prevented . . . . Consequently, although the Washington office did know of Kirkland's representation of Westinghouse on the utility contracts litigation, none of the Washington attorneys working on the API divestiture assignment knew of the separate Westinghouse antitrust complaint until it was filed in court on October 15, after the stock exchanges closed on that day . . . . Although the attorneys working on the Westinghouse complaint do not profess complete ignorance of the API representation by their brothers in Washington, they state that they did not communicate with the Washington attorneys about the API work prior to October 15 and had no knowledge of the data collected for the API report. (448 F.Supp. at 1296; App. 18)

In reaching its conclusion that Kirkland had not represented respondents, the District Court proceeded on the universally accepted premise that the attorney-client relationship is a consensual one. Respondent Kerr-McGee itself conceded in the District Court that, "It is, of course, true that *the attorney-client relationship is a consensual one* between principal and agent." (Joint Appendix at 561, 569; emphasis supplied throughout unless otherwise noted.) Since respondents further conceded that no express relationship existed, the District Court focused on their contention that such a relationship was to be

implied from the conduct of the parties. The Court analyzed such factors as the extent to which Kirkland had been able to affect repondents' legal relationships; the extent to which it had worked on behalf of respondents, rather than API; and the extent to which respondents, as contrasted with API, had the right to control Kirkland's work. On all counts the Court found the evidence weighed conclusively against respondents. (448 F.Supp. at 1301-03; App. 28-32)

The District Court also took specific note of respondents' after-the-fact affidavits that they "believed" or "understood" that an attorney-client relationship existed. The Court found, however, that "The *contemporaneous* statements of the parties, as reflected in the letters and memoranda in the record, *all lead to the conclusion* that Kirkland did not represent the oil companies." (*Id.* at 1303; App. 33) Additionally, during the very period when respondents claimed to have formulated their "beliefs," the Court found that Kirkland's Chicago office was engaged in discovery efforts against respondents aimed at establishing the existence of the producer conspiracy. The Court found that Kirkland's "discovery forays were viewed [by respondents] with circumspection, limited accommodation, or even outright resistance," negating that Kirkland was acting as attorney for respondents. (*Id.* at 1298-1300, 1302; App. 22-27, 30)

Based on these and other findings, the District Court concluded that, "[v]iewed in its totality, we believe the evidence shows that no attorney-client relationship has existed between Kirkland and the oil companies." (*Id.* at 1303; App. 33) Consequently, there could be no violation of Canons 4 and 5, which depend upon the existence of such a relationship.[7] While the Court believed there was "some evidence" that

[7] Canon 4 provides that "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides that "A lawyer should exercise independent professional judgment on behalf of a client."

Kirkland had transgressed Canon 9's injunction against the "appearance of professional impropriety," it described the apparent impropriety as falling within "the twilight zone . . . where black-letter rules blur into grayish hues." And after an extensive analysis the Court concluded that, under all the circumstances, disqualification was too drastic a remedy in view of the lack of prejudice to respondents and the minor character of the ethical grievance. (*Id.* at 1304, 1306; App. 34-35, 38)

3. *The Court of Appeals' Opinion.*

The Court of Appeals allowed an immediate appeal and reversed. The Court held that neither express nor implied consent is an essential ingredient of an attorney-client relationship. Rather, it held that the submission of confidential information to an attorney, coupled with a later assertion of an uncommunicated "belief" that the attorney was acting as its counsel, suffices to impose an attorney-client relationship. The Court further held that the genuineness and reasonableness of respondents' belief was "established" by the litigation affidavits filed by a single employee of each respondent. (App. 70)

The Court of Appeals also held that the knowledge and conduct of lawyers from Kirkland's Washington office must be imputed, as a matter of law, to the lawyers from Kirkland's Chicago office. On this basis the Court held irrelevant the District Court's finding of fact that no confidential information was communicated by the Washington lawyers working on the API report to the Chicago lawyers working on the Westinghouse litigation. (App. 72-73)

Finally, despite its concession that the case presented "novel" issues (App. 53) the Court held that disqualification was automatic. In contrast with the District Court's lengthy analysis of the factors bearing upon disqualification, the Court of Appeals' consideration was confined to a single sentence: "The fact that the two contrary undertakings by Kirkland occurred contemporaneously, with each involving substantial stakes and substantially related to the other out-balances the

client's interest in continuing with its chosen attorney." (App. 74)

REASONS FOR GRANTING THE WRIT

This antitrust case has been called "the largest private legal battle ever—in terms of potential damages as well as overall ramifications."[8] As the District Court found, its repercussions are nationwide, for the "allegations of the complaint paint a picture of uranium price-fixing and supply restrictions which spell higher costs for utilities and ultimately higher charges for customers as well." (448 F.Supp. at 1306; App. 38)

The disqualification order also comes in a case of great complexity. "Our impression of this case, and we think it objectively verifiable," said the District Court, "is that it involves an incredibly complex factual situation which implicates the nationwide and multinational connections of virtually the entire uranium industry." (*Id.;* App. 38) In the development of petitioner's antitrust complaint and related litigation its counsel has already "reviewed large portions of the millions of documents produced, [and] has conducted hundreds of depositions and interviews." (*Id.* at 1289; App. 3)

Given the enormous public interest in this specific antitrust case, the Court of Appeals' draconian order directing disqualification of counsel deeply enmeshed in the litigation is no ordinary matter of mere "private" concern. But the public interest in this petition far transcends even these antitrust concerns, important as they are. The Court's disqualification order presents the classic instance—and vice—of an appellate court prematurely injecting itself into a trial court's administration of litigation. By ordering disqualification at this interlocutory stage, the Court of Appeals transgresses intertwined jurisdictional and substantive restraints.

[8] N.Y. Times, July 9, 1978, Sec. 3.

First, in erroneous reliance upon the collateral order doctrine, the Court permitted an immediate appeal from the District Court's order denying disqualification. This ruling, which conflicts with those of two other circuits and is inconsistent with the controlling precedents of this Court, contravenes the "finality" requirements of 28 U.S.C. § 1291. Allowing such immediate appeals seriously disrupts the administration of the judicial process by encouraging more disqualification motions and appeals, causes delay and confusion in the district courts pending disposition of disqualification appeals, and leads, as it led in this case, to abstract substantive rulings which are divorced from any consideration of whether the supposed error was prejudicial.

Second, having erroneously asserted appellate jurisdiction, the Court fashioned legal standards seriously at variance with any rational system for the delivery of legal services and for judicial supervision of the bar. The Court held that an attorney-client relationship can be imposed even though it is undisputed that the lawyer never expressly or impliedly consented. In treating litigation affidavits as dispositive, the Court permits sophisticated, multinational corporations to use their membership in an enormous trade association to disqualify counsel simply by asserting that they "believed" that the association's counsel was acting in their interest. This will have particular impact in private efforts to enforce federal legislative policies governing the conduct of large businesses. In the antitrust area, for example, the Court's rule may prevent large firms with substantial nationwide clients from bringing enforcement actions.

This problem is compounded by the Court's disregard of Kirkland's careful and successful efforts to maintain a rigid separation between its Washington and Chicago offices. Contrary to the rulings of at least two other circuits, the Court held that the presumption that an attorney's knowledge is shared by his partners cannot be rebutted by a particularized factual showing. By transforming this rebuttable factual presumption

into an irrebuttable legal one, the Court imposes the drastic remedy of disqualification without any proof of actual harm, and it needlessly discourages law firms and government agencies from hiring already-practicing attorneys.

Third, the Court subverted the District Court's primary responsibility to find the pertinent facts and to fashion appropriate relief. Despite unreversed District Court findings completely inconsistent with respondents' assertions of "belief"[9] the Court refused to remand the case for a determination of the genuineness and reasonableness of respondents' "belief." The apparent basis for this unusual action was the Court's willingness to give conclusive effect to self-serving affidavits. The Court's holding thus frustrates, rather than advances, the goals of the Canons of Ethics and the Disciplinary Rules. Their aim is to encourage self discipline in the bar. But no firm can rationally plan its conduct if affidavits prepared for litigation are treated as decisive in establishing a *prior* attorney-client relationship uncommunicated to and unknown by the lawyer. The Court also committed clear error when it held that disqualification is mandatory in this case. Even under the Court's novel legal standard, the District Court must be given the discretion to determine whether the drastic remedy of disqualification is necessary.

POINT I.

The District Court's Order Denying Disqualification of Counsel Was Not Appealable Prior to Final Judgment.

Despite the plainly interlocutory character of the District Court's ruling denying disqualification, the Court of Appeals permitted an immediate appeal by treating the order as a "final decision" under 28 U.S.C. § 1291, citing without elaboration

[9] Not only was there no communication by respondents of their belief in the existence of the lawyer-client relationship, there is no evidence that respondents recorded this belief either at the time it was supposedly formed or thereafter.

Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949).[10] (App. 54) The Court made no effort to analyze the current reach of *Cohen's* collateral order doctrine in light of this Court's recent decisions in *United States* v. *MacDonald*, ___ U.S. ___ (1978), and *Coopers & Lybrand* v. *Livesay*, ___ *U.S.* ___ *(1978)*.

There is a clear conflict in the circuits on the appealability of orders denying disqualification. The District of Columbia and Ninth Circuits hold that such orders are *not* appealable.[11] The First Circuit, which has not ruled upon the matter, has criticized the leading decision sustaining appealability.[12] Other circuits, relying upon *Cohen*, have held that the orders are immediately appealable,[13] although not without expressed reservations on the wisdom of doing so.[14]

[10] The Court's citation to its own decision in *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976), is equally unilluminating. *Schloetter* simply relied on *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974), the leading case permitting appeal. Petitioner called the mounting academic and judicial criticism of that decision to the Court's attention (Brief p. 54), but did not press the matter further because of the Court's clear and recent adherence to *Schloetter*. *E.g.*, *Whiting Corp.* v. *White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977). *See also In the Matter of the Special February 1977 Grand Jury*, ___ F.2d ___ (7th Cir. August 11, 1978). In this Court, however, the jurisdictional question must be fully addressed.

[11] *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F.2d 1022 (D.C. Cir. 1976); *Cord* v. *Smith*, 338 F.2d 516 (9th Cir. 1964), *clarified*, 370 F.2d 418 (9th Cir. 1966).

[12] *Grinnell Corp.* v. *Hackett*, 519 F.2d 595, 598 n.4 (1st Cir. 1974).

[13] Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450 n.4 (1978) (collecting cases).

[14] *E.g.*, *Hackett* v. *General Host Corp.* 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

This conflict among the circuits should be resolved by this Court, since the issue is of considerable practical moment. We do not minimize the importance of maintaining high standards for the bar by pointing out the increasing use of disqualification motions as a litigation tactic. In complex commercial litigation involving large diversified corporations, an arguable claim of conflict of interest can be asserted almost at will. Consequently, such motions have become "yet another device by which to delay final determination on the merits." *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F.2d 1022, 1027 (D.C. Cir. 1976). Attorneys "now commonly use disqualification motions for purely strategic purposes." *Woods* v. *Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). Even the Second Circuit, which continues to permit appeals, has acknowledged that they "have become 'common tools of the litigation process.'" *Allegaert* v. *Perot*, 565 F.2d 246, 251 (2d Cir. 1977). Indeed, that Court has indicated it might order a rehearing *en banc* on the whole issue. (*Id.*)

It is difficult to comprehend any public importance in permitting the wholesale appeal of orders denying disqualification. *Grinnell Corp.* v. *Hackett*, 519 F.2d 595, 597 (1st Cir. 1974). That immediate appeal might obviate the need for reversal of a lengthy trial is a point equally applicable to all "important" interlocutory orders, such as discovery orders, privilege claims, etc. Nonetheless, these orders cannot be appealed. *See Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30 (1943). Moreover, actual harm is often done by allowing an immediate appeal. It increases the burdens on appellate dockets. More important, it substantially disrupts administration of the litigation process by trial courts, both to their detriment and to that of the litigants. In sum, even when disqualification motions present special issues, "The savings effected by interlocutory appeals in these rare cases are greatly outweighed by the costs of permitting such appeals in the more numerous cases where the issue is rightly decided or becomes moot, settled, or inconsequential before final judgment." Note,

The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts, 45 U. Chi. L. Rev. 450, 465 (1978).

The decisions of this Court make clear that orders denying disqualification do not fall within the "small class" of exceptions which are governed by the collateral order doctrine. To be immediately appealable under that doctrine,

> the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. *Livesay*, ___ U.S. ___ (1978), *citing United States* v. *MacDonald*, ___ U.S. ___ (1978); *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

It is difficult if not impossible to maintain that a denial of disqualification is "effectively unreviewable on appeal from a final judgment." The feared injury in such cases is a tainted judgment resulting from the improper use of confidential information. The present case, where no disclosure has occurred or will occur, highlights the speculative nature of such a fear. But even if the facts were different, any such "injury" could be adequately redressed without resort to the extraordinary procedure of interlocutory appeal. The district courts are fully equipped to issue appropriate protective orders and to impose necessary sanctions. If a district court fails in its duty, the aggrieved party may assert the improper use of confidential information as a ground for reversal and seek a new trial at which the information would be excluded. Of course, if a putative client prevails on the merits, he is not "aggrieved" at all, and he has no cause to complain.[15]

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[15] Since orders denying disqualification, if erroneous and prejudicial, can be cured on appeal from a judgment on the merits, they bear no similarity to those orders which by their nature result in the irretrievable loss of independent rights.

(Footnote continued on following page)

Nor are the other prerequisites of the collateral order doctrine satisfied in cases such as this. Refusal to disqualify counsel does not "conclusively determine the disputed question." As new facts develop during discovery or trial, the district court could reverse itself outright or enter a protective order tailored to ensure that even remote possibilities of prejudice are guarded against. Similarly, the issue in attorney disqualification is not "completely separate from the merits of the action." Most disqualification motions allege that opposing counsel previously represented the moving party. Prior representation, however, does not itself warrant disqualification. Under the "substantial relationship" test, there must be a nexus between the issues involved in the prior representation and those of the present litigation. *E.g., Cannon* v. *U.S. Acoustics Corp.*, 398 F.Supp. 209, 211-24 (N.D. Ill. 1975), *aff'd in relevant part*, 532 F.2d 1118 (7th Cir. 1976). The district court must examine in detail the issues involved in both, and in complex litigation this inquiry is exhaustive indeed.

In sum, there is no justification for the Court of Appeals' departure from the final judgment rule. If review is postponed, the moving party must then show that it was actually prejudiced by the denial of the disqualification motion. See 28 U.S.C. § 2111.[16] This is no reason to permit an immediate

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E.g., Cohen v. *Beneficial Loan Corp., supra* (to be financially protected from "strike suits"); *Abney* v. *United States, supra* (to be free from the ordeal of a second criminal trial); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (not to be forced to finance the opponent's litigation).

[16] In the Second Circuit, where immediate appeal of disqualification denials is both permissible and frequent, the Court now requires as a condition for reversal that appellants demonstrate actual injury resulting from use in the later case of information disclosed to counsel in the first representation. *E.g., W.T. Grant Co.* v. *Haines*, 531 F.2d 671, 676-77 (2d Cir.

appeal. Quite the contrary, the "harmless error" rule works in tandem with the "final judgment" rule to preclude academic legal pronouncements bearing no relation to the ultimate merits of the litigation or the substantial rights of the parties. When the statutory restraints on appellate jurisdiction and scope of review are ignored, the likely consequence—as illustrated by this case—is the formulation of indefensible and harmful substantive rules of law.

POINT II.

The Unprecedented Conflict of Interest Standard Imposed by the Court of Appeals Will Cause Unnecessary and Unjustifiable Harm.

By rejecting the District Court's holding that an attorney-client relationship arises "*only* when the parties have given their consent, either express or implied, to its formation,"[17] the Court of Appeals committed fundamental substantive errors which will have far-reaching and untoward repercussions. These errors have already led the Court to order disqualification of petitioner's well prepared and chosen counsel in an antitrust case of vast public importance. Their general application cannot help but have equally detrimental results in other areas.

(Footnote continued from preceding page)

1976); *Lefrak* v. *Arabian Am. Oil Co.*, 527 F.2d 1136, 1139 (2d Cir. 1975). Although a preliminary showing of probable harm will not satisfy the statutory requirement that the reviewing court consider only those errors which actually "affect the substantial rights of the parties," the Court of Appeals in this case has not taken even this modest step toward compliance with section 2111.

[17] App. 62-63, *quoting* 448 F.Supp. at 1300 (emphasis in the opinion of the Court of Appeals).

The Court's abrogation of the mutual consent requirement is contrary to the established precedents of two circuits[18] and every other court of which we are aware.[19] The result is especially startling, for the existence of an attorney-client relationship is a matter of enormous signficance to both client and lawyer. Once established, important and far-reaching duties attach. It is, accordingly, not a relationship that can or should be thrust upon either party without his express or, at the very least, implied consent.

The precise basis for disregarding this universally accepted proposition is never made clear by the Court of Appeals. Certainly no direct precedent is cited. Instead the Court seems to have extrapolated from two admittedly valid legal propositions, neither of which, however, offers support for abandoning the correct rule.

First, the Court of Appeals rightly observes that, in the attorney-client relationship, an attorney owes duties to his client more stringent than those normally owed by an agent to his principal. (App. 63-65) But this hardly suggests that those duties can be imposed without his knowledge or consent. If anything, the very stringency of the attorney's fiduciary obligations argues forcefully against their imposition without a clear manifestation of his consent. To hold otherwise is to confuse the threshold issue of whether an attorney-client relationship exists—which depends on the consent of both parties—with the subsequent issue of the scope of the attorney's duties once that relationship has been created.

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[18] "An attorney-client relationship is one of agency and arises only when the parties have given their consent, either express or implied, to its formation." *Committee on Professional Ethics & Grievances* v. *Johnson,* 447 F.2d 169, 174 (3d Cir. 1971). "Such a relationship can only be formed with the consent of the attorney and his client." *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 90 (5th Cir.), *rehearing denied,* 536 F.2d 1025 (5th Cir. 1976).

[19] See authorities collected in 7 C.J.S. *Attorney and Client* § 65.

The Court's second observation, that a lawyer may on occasion owe a *limited* fiduciary obligation to a non-client,[20] fares no better. It affords no basis for adopting a general rule that a lawyer's assumption of the *specific, limited* fiduciary obligation of confidentiality toward a non-client creates a full-scale lawyer-client relationship with *all* the attendant fiduciary obligations which inhere in that relationship. As the District Court observed, general fiduciary duties "of confidentiality, loyalty and obedience are consequences of a properly formed [attorney-client] relationship, not the origin of one. The danger of allowing the tail to wag the dog is real." (448 F.Supp. at 1302; App. 31)

The Court's holding is particularly alarming in the present context. It is not unusual for trade association counsel to assist in compiling data to avoid disclosure of commercially sensitive matters among the membership. Such a limited undertaking has never been thought to create an attorney-client relationship with each of the members. Here, however, the Court's standard gives conclusive effect to a member's litigation affidavit asserting its belief—uncommunicated and unrecorded at the time—that an attorney-client relationship existed. It thus becomes incumbent upon the lawyer to ascertain who may have entertained such a belief. Yet it is in fact impossible for an attorney dealing with hundreds or (in API's case) thousands of association members to know who believes or believed him to be their lawyer, much less when the supposed belief first arose. Indeed, the Court does not even require the affiant to be responsible for retaining counsel.

The Court's erroneous departure from the rule of consent is compounded by the irrebuttable presumption which it creates

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[20] (App. 68-70) For example, as the Court of Appeals noted, information disclosed in confidence by prospective clients or by co-defendants represented by other counsel must be kept confidential even though there is no lawyer-client relationship between the disclosant and counsel.

that everything known or done by Kirkland's Washington office was known or done by its Chicago office. This legal presumption simply sweeps aside the District Court's finding that a "Chinese wall" existed between the two offices and that there was an "absence of any hint of actual disclosure" of respondents' data to the Chicago attorneys. (448 F.Supp. at 1305; App. 37)[21]

This exceedingly harsh rule is likely to have unfortunate consequences either unappreciated or unforeseen by the Court of Appeals. For example, the Court brushes aside the very real differences between large and small law firms by inaccurately suggesting that the District Court "exempt[ed]" Kirkland from ordinary ethical considerations because of the firm's size, geographical dispersion and clientele. (App. 53) The District Court did no such thing. Rather, that Court recognized that if "ordinary ethical considerations" are to continue to guide the profession, they must be applied with the practical recognition that the conflict problems they seek to regulate will vary in kind with the nature and size of the firm. (448 F.Supp. at 1287-88, 1304-05; App. 1-2, 35-37)[22] This recognition is fully in line with

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[21] While the Court of Appeals did not seriously challenge the District Court's finding of fact that a rigid separation existed between the two offices, it alluded to one indirect contact between API and Kirkland's Chicago office. (App. 72) But that contact, as the District Court explicitly found, merely involved the preparation of a theoretical legal memorandum on interlocking directorates and had nothing to do with uranium. (448 F.Supp. at 1296; App. 19)

[22] Just recently one attorney described the problems facing large law firms in these terms:

> As the number of lawyers, clients, and particular matters within a single firm increases, the number of ethical problems increases exponentially.
>
> Our own firm has grown from 20 to more than 100 lawyers over the past 15 years. In the field of conflicts alone, we have found that where perhaps one in twenty

(Footnote continued on following page)

those circuits which have held that the presumption of imputed knowledge is not conclusive, but may be rebutted by factual proof that confidences were not shared by different members of the same firm.[23]

The importance of the Court's rigid holding on disqualification cannot be overestimated, particularly given the volume of important and complex commercial, regulatory and antitrust litigation in the Seventh Circuit. The Court's view would substantially reduce the ability of large firms to maintain diversity in their practice—to the detriment of the general public. Moreover, the rule announced threatens to eviscerate the policies of the federal antitrust laws and other federal regulatory statutes, which depend heavily on private enforcement, by accelerating the tendency toward separate plaintiffs and defendants antitrust bars—with large, experienced firms like Kirkland & Ellis inevitably locked into the latter orbit.[24] Finally, the irrebuttable attribution rule would severely restrict

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> new matters for new clients presented some sort of conflict question when we began, today the ratio is something like one in three.

Lloyd Cutler, *The Role of the Private Law Firm,* 33 Bus. Law. 1549 (1978).

[23] *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.,* 518 F.2d 751, 754 (2d Cir. 1975); *Gas-A-Tron of Arizona* v. *Union Oil Co.,* 534 F.2d 1322, 1325 (9th Cir. 1976); *City of Cleveland* v. *Cleveland Electric Illuminating Co.,* 440 F.Supp. 193, 200-211 (N.D. Ohio 1976), *aff'd,* ____ F.2d ____ (6th Cir. 1977). For endorsement of the Chinese wall approach in other contexts see, *e.g., United States* v. *Bianco,* 534 F.2d 501, 510 (2d Cir. 1976); Note, *The Chinese Wall Solution to the Conflict Problems of Securities Firms,* 50 N.Y.U.L. Rev. 459 (1975).

[24] This Court had repeatedly emphasized both the importance of private enforcement of the antitrust laws and that these statutes are not to be unnecessarily undermined by generalized concerns. *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 138 (1968).

lawyers' career flexibility. If a lawyer in private practice shares, *as a matter of law,* all the confidences of his colleagues, he would as a practical matter be unable to obtain employment with a firm which represents adversaries of "his" former clients. Government lawyers seeking to enter private practice will face similar problems under the Court's approach, since prospective employers may be disqualified if the lawyer's agency investigated the firm's clients or clients' adversaries. Compare, *e.g.,* ABA Formal Ethics Opinion 342 (November 24, 1975); *Kesselhaut* v. *United States,* 555 F.2d 791 (Ct. Cl. 1977).

POINT III.

The Court of Appeals Improperly Usurped the District Court's Role in the Finding of Facts and the Fashioning of Relief.

Even if the Court had been correct in rejecting long-accepted conflict of interest standards, it committed plain error: (a) by ignoring the District Court's fact-finding role and giving conclusive weight to conclusory litigation affidavits in resolving sharply controverted evidentiary issues, and (b) by substituting its own judgment for that of the District Court on whether the drastic remedy of disqualification was appropriate in the circumstances of this case. This improper invasion of the District Court's role reinforces the conclusion that no appeal was justified in the first place.

A. The Court Disregarded the District Court's Findings of Fact and Accepted as Conclusive Respondents' Self-Serving Affidavits.

Under the Court's new rule of law, the critical factor becomes whether respondents had a genuine and "reasonable belief" that Kirkland was acting as their attorney. (App. 53,70) Rather than relying on the District Court to weigh the evidence on this all-important factual issue, however, the Court

of Appeals gave conclusive weight to respondents' self-serving affidavits. This dependence on conclusory affidavits, prepared long after the fact and for the exclusive purpose of supporting a motion to disqualify, is impossible to comprehend and patently erroneous. It is elementary that a party cannot swear his opponent out of court by submitting after-the-fact and conclusory affidavits attesting to the inner workings of his mind[25] —to say nothing of the "mind" of large corporations.

While space limitations preclude analysis of the affidavits from each respondent, an examination of the Gulf affidavit in this case[26] is instructive. Gulf's only claim of "belief" was asserted by its Washington legislative lawyer. Neither Gulf's general counsel, who must approve retention of outside counsel,[27] nor the attorney who dealt with Kirkland's API and Westinghouse lawyers, and who himself attended meetings of the uranium cartel, filed affidavits as to his "belief." Moreover, if Gulf was really "given to believe" months before the

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[25] *E.g., Askew* v. *Bloemker,* 548 F.2d 673, 679 (7th Cir. 1976); *Milligan* v. *Anderson,* 522 F.2d 1202, 1206 (10th Cir. 1975). Especially in disqualification matters, affidavits must specify with particularity the alleged bases for disqualification. *Cannon* v. *U.S. Acoustics Corp.,* 398 F.Supp. 209, 219 n.20 (N.D. Ill. 1975), *aff'd in relevant part,* 532 F.2d 1118 (7th Cir. 1976); *U.S. Industries, Inc.* v. *Goldman,* 421 F.Supp. 7, 11 (S.D.N.Y. 1976); *Moritz* v. *Medical Protective Co.,* 428 F.Supp. 865, 874-75 (W.D. Wis 1977).

[26] Gulf has raised disqualification issues against opposing counsel in various aspects of its uranium litigation: (i) The motion to disqualify Kirkland now at issue; (ii) A motion to disqualify counsel for United Nuclear Corp. filed in the case below, also denied by Judge Marshall; (iii) A motion to disqualify counsel for United Nuclear filed in state court in Santa Fe, New Mexico. *United Nuclear Corp.* v. *General Atomic Co.* No. 50827 (Dist. Ct. 1st Jud. Dist.); and (iv) A motion denied in *Pennsylvania Power & Light Co.* v. *Gulf Oil Corp.,* 74 D. & C. 2d 421 (Pa. Comm. Pl. 1975).

[27] *Pennsylvania Power & Light Co.* v. *Gulf Oil Corp.,* 74 D. & C. 2d 431, 436 (Pa. Comm. Pl. 1975).

complaint that Kirkland was its lawyer, it is hard to imagine why it took Gulf and its general counsel until three months after the complaint was filed to assert that belief. This is particularly puzzling since, within two weeks of the antitrust complaint, Kirkland subpoenaed Gulf documents and its general counsel for trial testimony on the conspiracy issue in the utilities litigation. (448 F.Supp. at 1300; App. 26).

Further, the Court took no account of the District Court's *unchallenged* findings which directly refuted any "reasonable belief" by respondents that Kirkland was their lawyer. Judge Marshall found: "All the *contemporaneous* documents . . . state that Kirkland was retained by API, and make no reference to API members as Kirkland's clients" and that, "The *contemporaneous* statements of the parties, as reflected in the letters and memoranda in the record, all lead to the conclusion that Kirkland did not represent the oil companies." (*Id.* at 1301, 1303; App. 28, 33).

In short, having injected a novel "belief" standard, the Court of Appeals compounded its error by treating respondents' conclusory litigation affidavits as determinative and in bypassing the District Court's factual determinations bearing on that issue.

B. The Court Ignored the District Court's Determination that Disqualification Was an Inappropriate Remedy.

The authorities are uniform that disqualification is not an automatic result of ethical violations[28] and that the ultimate decision on this issue must rest largely in the discretion of the

[28] *E.g., Meat Price Investigations Ass'n* v. *Spencer Foods, Inc.*, 572 F.2d 163, 165 (8th Cir. 1978) ("In determining whether an attorney should be disqualified from participating in a lawsuit . . . competing interests must be balanced); *Kesselhaut* v. *United States*, 555 F.2d 791 (Ct. Cl. 1977); *W.T. Grant Co.* v. *Haines*, 531 F.2d 671, 677 (2d Cir. 1976) ("[T]his court has squarely held that a violation of professional ethics does not in any event automatically result in disqualification of counsel").

District Court.[29] After a thoughtful examination of all the evidence, Judge Marshall stated his "firm conviction" that "disqualification of Kirkland is a drastic, unjustified and inequitable resolution of a minor ethical grievance." (448 F.Supp. at 1306; App. 38). The Court of Appeals failed to articulate why the District Court committed any abuse of discretion in its assessment of the relative interests implicated by the disqualification motions, let alone demonstrate why the "drastic" remedy of disqualification was required.[30]

Here, thoroughly prepared counsel has been expelled from an antitrust case of vast public significance, and petitioner has been denied counsel of its choice in a case where its very corporate existence is at stake. The burdens imposed by disqualification are enormous, since this matter "involves an incredibly complex factual situation which implicates the nationwide and multinational connections of virtually the entire uranium industry." (448 F.Supp. at 1306; App. 38) Kirkland has been in 17 lawsuits raising these issues, has taken "literally hundreds" of depositions bearing on them, and has had two and a half years of experience with the evidence. The District Court found that this long experience would be "invaluable to the efficient prosecution" of the conspiracy case and that to

[29] District courts possess "broad discretion in determining whether disqualification is required in a particular case and . . . the scope of our review is accordingly limited." *Whiting Corp.* v. *White Machinery Corp.*, 567 F.2d 713, 715 (7th Cir. 1977); "[W]e continue to emphasize the great reliance we place upon the district court's exercise of discretion." *Allegaert* v. *Perot*, 565 F.2d 246, 251 (2d Cir. 1977).

[30] "Disqualification of counsel is a drastic measure and conceivably could have due process implications, especially when counsel has served throughout proceedings as involved and lengthy as these and the client's investment in legal representation is substantial." *Fredonia Broadcasting Corp.* v. *RCA Corp.*, 569 F.2d 251, 257 (5th Cir. 1978); "Disqualification is a drastic step which should be avoided if possible." *Ross* v. *Great A&P Tea Co.*, 447 F.Supp. 406, 409 (S.D.N.Y. 1978).

"force Kirkland to give up the reins to an inexperienced driver at this stage of the journey will cause inevitable delay in the progress of the litigation and may well compromise the just resolution of a vital public issue." (*Id.* at 1305, 1306; App. 37, 38)

We do not minimize the importance of the ethical considerations involved in this case, but we believe the District Court was patently correct that they do not warrant the draconian remedy of disqualification. Even the Court of Appeals acknowledges that the ethical issues are "novel" and that no actual disclosure of the putative clients' confidences occurred. (App. 52, 71-72) Given Kirkland's lack of knowledge or consent to the asserted relationships with respondents, surely disqualification was not required as a matter of law. In ordering such remedy, the Court of Appeals once again usurped the primary responsibility of the District Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

September 13, 1978

Respectfully submitted,

WILLIAM R. JENTES
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

HENRY PAUL MONAGHAN
765 Commonwealth Avenue
Boston, Massachusetts 02138
(617) 353-3812

APPENDIX

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 76 C 3830.

WESTINGHOUSE ELECTRIC CORPORATION,

Plaintiff,

v.

RIO ALGOM LIMITED, Rio Algom Corporation, Rio Tinto Zinc Corporation Limited, RTZ Services Limited, Rio Tinto Zinc Corporation, Conzinc Rio Tinto of Australia Limited, Mary Kathleen Uranium Limited, Pancontinental Mining Limited, Queensland Mines Limited, Nuclear Fuels Corporation, Anglo-American Corporation of South Africa, Limited, Engelhard Minerals and Chemicals Corporation, Denison Mines, Limited, Denison Mines (U.S.) Incorporated, Noranda Mines Limited, Gulf Oil Corporation, Gulf Minerals Canada Limited, Kerr-McGee Corporation, the Anaconda Company, Getty Oil Company, Utah International Inc., Phelps Dodge Corporation, Western Nuclear, Inc., Homestake Mining Company, Atlas Corporation, Reserve Oil and Minerals Corporation, United Nuclear Corporation, Federal Resources Corporation and Pioneer Nuclear, Inc.

Defendants.

April 18, 1978

MEMORANDUM OPINION

Marshall, District Judge.

At issue in this complex antitrust litigation are a multitude of motions to disqualify counsel, on the grounds that the present litigation posture of two law firms creates a conflict of interest with their prior representation of several of the corporate defendants in earlier legal settings. The disqualification issues pose sensitive and difficult problems of legal ethics under the ABA's Code of Professional Responsibility. They also raise the unsettled question of whether the mechanical disqualification of law firms for ethical transgressions is an appropriate judicial remedy in cases involving large multi-city corporate law firms, enormously complex multi-district litigation, and corporate litigants with nationwide and even multi-national connections.

With the modern-day proliferation of large law firms representing multi-billion dollar corporations in all segments of the economy and the governmental process, it is becoming increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests. While a recognition of these pragmatic realities may contribute to a broader perspective on current ethical problems, our paramount obligation is to balance an individual's freedom to choose his own counsel with the need to preserve the highest ethical standards for professional conduct. In fulfilling this task, we are guided by the words of Judge Kaufman that the resolution of ethical problems rests on a "painstaking analysis of the facts and precise application of precedent." *United States* v. *Standard Oil Company,* 136 F.Supp. 345, 367 (S.D.N.Y. 1955).

The present action is one phase of a complex and continuing series of lawsuits involving the purchase and sale of uranium used in nuclear reactors. The triggering event oc-

curred on September 8, 1975, when Westinghouse Electric Corporation (Westinghouse), a major manufacturer of nuclear reactors, notified a number of utility companies that performance of 17 of its long-term uranium supply contracts had become "commercially impracticable" under § 2-615 of the Uniform Commercial Code. In its notice, Westinghouse explained that unforeseen contingencies in the uranium market, including the 1973 Arab oil embargo, had caused extraordinary increases in uranium prices and a shortage of uranium supplies. Faced with a significant cost-price differential affecting the scheduled delivery of some 65 million pounds of uranium over the next 20 years, Westinghouse said that the unforeseen events excused full performance of its contractual obligations. In response, the affected utilities filed 13 federal actions, one state action, and three foreign actions against Westinghouse alleging breach of contract and challenging Westinghouse's invocation of § 2-615. The federal actions have been consolidated for trial in the Eastern District of Virginia.

As an outgrowth of its defense of these contract actions, Westinghouse investigated the possibility that the uranium price increases were caused by conspiratorial activities of the uranium producers. On October 15, 1976, Westinghouse filed the present antitrust action in this Court against 12 foreign and 17 domestic corporations engaged in various aspects of the uranium industry. Westinghouse alleges that beginning in 1972, certain of the foreign defendants entered into a cartel agreement to rig bids, fix prices and contract terms, divide and allocate the world uranium market among the uranium producers, and require Westinghouse and other uranium resellers to pay discriminatorily high prices. The complaint also charges that the foreign defendants agreed to extend the effects of their cartel to the United States, in order to benefit their U.S. subsidiaries and to prevent price competition from other U.S. uranium producers and sellers. To cement this American connection, the foreign producers allegedly struck a bargain with U.S. producers, whereby the foreign producers promised

not to underprice the U.S. producers and the domestic producers in return agreed to drop their opposition to the U.S. government's phase-out of its embargo on the enrichment of foreign uranium. The domestic producers, with the advice and support of the foreign producers, allegedly adopted contracting and pricing policies designed to raise current uranium prices to levels fixed by the foreign cartel. It is also charged that the U.S. producers agreed to withdraw uranium from the market, to boycott Westinghouse, to lobby foreign officials to refuse to sell uranium to Westinghouse, and to exchange market information in order to raise and stabilize prices. The effect of these actions, according to the complaint, has been to raise uranium prices to artificially high levels, fix the terms on which uranium is sold, curtail uranium supplies, divide the uranium market among the defendants, and deprive uranium purchasers of competition among producers, all to the injury of Westinghouse. For relief, Westinghouse seeks a declaration that defendants' conduct violates Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act, treble damages, and injunctive relief.

Throughout the uranium litigation, Westinghouse has employed Kirkland & Ellis as its lead counsel. The Kirkland firm is a two-city operation, with offices in Chicago and Washington, D.C. Its Washington office uses the name Kirkland, Ellis & Rowe. We will refer to the combined firm as Kirkland. Kirkland's Chicago lawyers number over 130, and its Washington branch contains about 40. Kirkland's representation of Westinghouse extends back into the early 1960's, and the uranium litigation alone has required the efforts of from 8 to 14 of its attorneys. In conducting the contract aspect of the litigation alone, Kirkland has reviewed large portions of the millions of documents produced, has conducted hundreds of depositions and interviews, and has generated some 2½ million dollars in legal fees.

The antitrust defendants have filed a host of motions to disqualify Kirkland & Ellis as Westinghouse's counsel in the

antitrust phase of this massive litigation. Their motions can be divided into three categories.

First, three oil company defendants (Kerr-McGee, Getty and Gulf) charge that on the same day Kirkland's Chicago office was filing a complaint attacking them for anticompetitive practices in the sale and pricing of uranium, Kirkland's Washington office was presenting an extensive legislative report to the American Petroleum Institute (API), a trade association, which develops the completely opposite thesis. The report argues in part that petroleum company involvement in the uranium field has had the beneficial effect of promoting competition in America's energy industries. The API commissioned the Kirkland study as part of an extensive lobbying effort directed at defeating proposed Congressional legislation which would have required oil and gas companies to relinquish their investments in alternative energy industries, including coal, uranium, geothermal and solar energy. All three oil companies are corporate members of the API. In the course of their participation in the study, they assert that they gave confidential industry and market data to Kirkland attorneys. Relying on Canons 4, 5 and 9 of the Code of Professional Responsibility the oil companies claim that Kirkland's simultaneous representation of both Westinghouse and the API creates a substantial conflict of interest, a potential for disclosure of confidential information, and the appearance of impropriety. To extinguish these adverse and potentially harmful interests, they demand the disqualification of the entire Kirkland firm or, alternatively, the dismissal of the oil companies from the present action.

Second, twelve other corporate defendants presume the validity of the API motions and argue that if those companies are dismissed, equitable considerations compel the court to disqualify Kirkland from suing the remaining defendants. Without raising any additional charges of conflicting interests, they argue that if ethical policies force Kirkland to reduce the

number of antitrust defendants, the remaining defendants will suffer several forms of prejudice. First, Kirkland's inability to prosecute the oil companies would require it to shift the blame to the remaining defendants. As a result, the jury would be presented with a distorted and truncated picture of the alleged industry cartel. Second, Kirkland's obligation to withhold confidential information gained during its API engagements would inhibit Kirkland's questioning of the oil company defendants after their dismissal if they are deposed or called as witnesses by the remaining defendants. Finally, Kirkland's role as an expert consultant to API on energy matters may make it necessary for Kirkland attorneys to be called as witnesses against Westinghouse and to explain why the API report appears to negate the claim of anti-competitive conduct in the uranium industry.

The third motion to disqualify is made by defendant Noranda Mines Limited, a Canadian corporation, and is completely independent of the other motions. Noranda asserts a direct conflict of interest resulting from Kirkland's prior representation of Noranda. From 1965 until 1967, Kirkland represented Noranda in several matters, including negotiations for the purchase of 51% of the shares of Essex Wire Corporation. Noranda claims that during this time Kirkland acquired intimate knowledge of its corporate organization, officers, marketing methods, business philosophy, and its business contacts with the United States. Noranda argues that these matters, especially Noranda's relationship with American-based or American-involved subsidiaries, provide the basis for Kirkland's allegations against Noranda in the Westinghouse suit. Citing Canons 4 and 9, Noranda contends that Kirkland's adversarial posture in the present litigation creates a conflict of interest, provides the potential for disclosure of confidential information, and gives rise to the appearance of impropriety.

The Kirkland firm has responded to these motions with a vigorous denial that any of them contains an appropriate basis

for its disqualification as Westinghouse's counsel. Although Kirkland does not attempt to rebut the charge that the Westinghouse complaint and the API report take inconsistent legal positions, it argues forcefully that none of the oil companies has demonstrated an essential prerequisite to their disqualification motions, namely the existence of an attorney-client relationship between those companies and the Kirkland firm. Kirkland argues that its professional employment has extended only to Westinghouse and API, not to any of API's member companies, and that its requests in the uranium contracts litigation, its contemporaneous written communications, and its course of dealings with the oil companies all negate the claim that Kirkland ever acted as their attorney. In addition, Kirkland contends that the API study did not produce any significant confidential information which has been or will be used against the oil companies in this case. Finally, Kirkland argues that any actual or apparent prejudice to the oil companies is strongly outweighed by the great hardship which would fall upon Westinghouse from Kirkland's disqualification in such a complex and lengthy chain of lawsuits.

In response to the other sets of motions, Kirkland contends that the arguments of the twelve other defendants are totally dependent on the merits of the oil company motions, and will be mooted by a denial of those motions. In any event, says Kirkland, those twelve companies lack standing to press their claims of prejudice since they admittedly were never clients of the Kirkland firm. Finally, in countering Noranda's motion, Kirkland concedes that Noranda was a former client, but contends that there is no substantial relationship between Kirkland's 1967 legal advice to Noranda on the proposed acquisition of a cable and wire company and its present prosecution of a uranium price-fixing conspiracy which is not alleged to have begun until 1972. Absent such a relationship between the past and present representations, says Kirkland, there is an insufficient adversity of legal positions to create a conflict of interest.

The issues in the three sets of motions have been exhaustively briefed. The factual allegations are supported by a plethora of affidavits, counter-affidavits and documentary evidence. Since the bulk of the materials pertain to the oil company motions, we will review those facts first. In doing so, our attention will be focused on three main issues: 1) the existence of an attorney-client relationship between the oil companies and Kirkland; 2) the quantitative and qualitative character of confidential information which the companies divulged to Kirkland; and 3) the contemporaneous knowledge and understanding of the companies and Kirkland in participating in the API study and the pending uranium contracts litigation.

The story begins with an analysis of Kirkland's involvement with the American Petroleum Institute (API). The API is a national petroleum trade association with 350 company and 7,500 individual members. It performs a wide variety of cooperative efforts for the petroleum industry. It develops technical measurement standards for petroleum equipment, and functions as a clearinghouse and forum for informational exchange and technical research. In addition, it monitors the status of industry-related legislation and attempts to articulate and gain support for the industry position with Congress, the media and the public at large. Kerr-McGee, Getty and Gulf are substantial dues-paying members of API. Getty and Kerr-McGee are represented on the API's Board of Directors.

In October, 1975 Congress was presented with legislative proposals to break-up the oil companies both vertically, i.e. by separating their control over production, transportation, refining and marketing entities, and horizontally, i.e. by prohibiting cross-ownership of alternative energy resources in addition to oil and gas. To the surprise of many, the divestiture proposals drew the support of about forty U.S. senators. (Hefler Exh. 15, p.3). The votes sent shock waves through the oil industry, since this proposed legislation threatened oil companies with a potential divestiture of millions of dollars of assets.

In November, 1975, the API launched a "Committee on Industrial Organization" to lobby against the proposals. According to one Committee member, the Committee was established "for the purpose of giving leadership to a major effort by the API to bring to the attention of the American public and Congress accurate, factual information . . ." on the divestiture legislation. (Lea, ¶ 4). In a mailgram dated December 10, 1975, Frank Ikard, API's president, asked "that each company designate one of its senior executives as coordinator or point of contact—an individual who will be familiar with the economic, legal, and public relations projects relating to divestiture/diversification being carried on by your company." (Hefler Exh. 2). The company contacts were intended to facilitate coordination of the Committee's activities with the individual companies. Ikard also stated that the Committee would be asking the oil companies for help and cooperation in providing additional manpower in the anti-divestiture campaign.

The Committee was organized into five task forces. An Economics and Analysis task force coordinated economic studies. A Public Affairs Task Force coordinated public relations. The External Constituencies Task Force sought support for the Committee's goals from various groups both within and outside the oil industry. The Governmental Relations Task Force kept an eye on developments on Capitol Hill. Finally, the Legal Task Force, which is the task force with relevant connections to the present motions, " . . . ha[d] the responsibility of conducting studies and legal research into the implications of divestiture and the adequacy of existing laws to keep the industry competitive." Each task force was headed by a senior executive from one of API's member oil companies. In the case of the Legal Task Force, the leadership spot was held by L. Bates Lea, General Counsel of Standard Oil Company of Indiana. Lea was assisted by Stark Ritchie, API's General Counsel. (Hefler Exh. 4).

In a January, 1976 letter to the company contacts in which he described the task forces, the Committee's Project Director

noted that "you will, from time to time, be receiving requests from me or from each of the various task forces." Recognizing the need for grass roots support from the API's corporate members, he added that "this Committee is small and cannot possibly, without the help of the companies, hope to accomplish the prodigious task it faces." (Hefler Exh. 4).

In his capacity as head of the Legal Task Force, Lea "concluded that it would be useful to have a law firm conduct an overall review of the whole subject of oil company energy diversification . . ." (Lea, ¶ 5). The review was to include an analysis of the structure of energy industries and of the economic and antitrust consequences of the proposed legislation. According to Lea, "the results were to be embodied in a final report which could serve as source material for those interested in the subject." (Lea, ¶ 5).

Lea found that Frederick M. Rowe, an attorney in Kirkland's Washington office, was willing to take the assignment. After consultation, Stark Ritchie concurred in Lea's recommendation to retain Mr. Rowe (Lea, ¶ 6). On February 25, 1976, Ritchie wrote a letter on API stationery to Rowe confirming the retention of the Kirkland firm on this assignment. (Ritchie Exh. 1). On May 4, 1976, Ritchie specified in a letter to Rowe that Kirkland's work should include the preparation of possible Congressional testimony and an analysis of the legislation's probable effect on oil companies which would have to divest assets. (Ritchie Exh. 2). To collect the data on those assets, Ritchie stated that API would arrange for interviews by Kirkland with a cross-section of industry personnel. He also added the following significant statement to the letter:

> "Your firm will, of course, act as an independent expert counsel and hold any company information learned through these interviews in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data."

According to Ritchie, these instructions on confidentiality were intended to protect the companies' proprietary information and to preclude the exchange of the information among the competitor members of API. (Ritchie, ¶ 5).

At Ritchie's request, the corporate interviews were mainly arranged by Gerald Thurmond, who was Washington counsel for Gulf and a member of API's Antitrust Strategy Group. (Ritchie, ¶ 4). On May 11, 1976, Thurmond scheduled an interview with Gulf officials to be held in Denver on May 20. (Mingee, Exh. A). Thurmond also called P. J. Hefler, API's company contact at Kerr-McGee, on May 24, 1976 to inform him of Kirkland's interviewing plans. (Hefler Exh. 7). The next day, Hefler returned a call from Nolan Clark, an attorney in Kirkland's Washington office, who asked to interview Kerr-McGee employees on a confidential basis. (Hefler, ¶ 19).

Nolan Clark had been assigned by Frederick Rowe to take primary responsibility for the data collection, analysis, and drafting of the API report. (Rowe, ¶ 3). During the period of May through December, 1976, Thurmond conversed with Rowe and Clark on several occasions to discuss strategies and industry impact in connection with the horizontal divestiture legislation. Thurmond states that he "was given to believe that the Kirkland firm was representing both API and Gulf Oil" on the divestiture work. (Thurmond, ¶¶ 6-8). In opposition to this statement, Clark asserts that he knows of no basis for the belief that Kirkland represented Gulf, that Thurmond never expressed or suggested that he held such a belief, and that Clark never made such a representation to any Gulf personnel. (Clark, ¶ 13).

Nolan Clark handled most of the interviews of industry personnel. (Rowe, ¶ 6). According to Clark, the interviews were designed to ascertain the probable effects of the divestiture legislation, to obtain information for API's anti-divestiture arsenal, and to help identify publicly available materials which

could be published in an API report. (Clark, ¶ 4). Clark was aware of the confidentiality restrictions imposed in Ritchie's May 4 letter.

Clark ultimately interviewed representatives of eight oil companies between April 29 and June 15, 1976. The companies included Gulf and Kerr-McGee, but not Getty. (Clark ¶ 7). In preparation for the Gulf interviews, Clark submitted a ten-page list of proposed questions to Thurmond, Gulf's Washington counsel, who forwarded them to Gulf personnel. (Thurmond, ¶ 7; Clark, ¶ 8). The questions were intended to elicit information on the economic consequences of the legislation, and to gather the most effective arguments against the proposed divestiture measures. (Clark, ¶ 6). The Gulf interviews were eventually held on May 28, 1976 and Kerr-McGee personnel were interviewed on June 9, 1976.

Before these interviews took place, Ritchie sent a May 25 cover letter and survey questionnaire to 59 API companies. (Ritchie, ¶ 6). In the introductory memorandum to the questionnaire, Ritchie made several representations which are important to the present questions. (Hefler, Exh. 9). First, he stated that Kirkland had been retained by the API "to assist in preparing positions, arguments and testimony in opposition to" the divestiture legislation. Second, he stated that Kirkland needed two types of publicly unavailable information in order to complete its objective study of the legislative impacts of the pending bills. That information consisted of the estimated value of assets invested in alternative energy fields that the companies would have to divest if the legislation were passed, and the past and projected outlays for research and development in these fields. Ritchie asked that the data be sent directly to Kirkland, not to the API. Finally and most importantly, Ritchie stated that:

> Kirkland, Ellis & Rowe is acting as an independent special counsel for API, and will hold any company information in strict confidence, *not to be disclosed to any other company,*

or even to API, except in aggregated or such other form as will preclude identifying the source company with its data. (emphasis in original).

This language paralleled similar instructions from Ritchie to the Kirkland firm on May 4. Consistent with this assurance, Ritchie advised the companies that they need not identify their companies by name when completing the questionnaires. According to Kerr-McGee, these communications were the beginning of an attorney-client relationship between Kerr-McGee and Kirkland. (Brief, p. 7).

R. J. Hefler, a Kerr-McGee Vice-President and API's company contact on the divestiture legislation, received the Ritchie memorandum "shortly after May 25," and apparently prior to his June 9 interview with Nolan Clark. (Hefler, ¶ 10). James Mingee, a Gulf Vice-President, received the memorandum on June 8, some ten days after his May 28 interview with Clark. (Mingee, ¶ 8). With both Kerr-McGee and Gulf, the memorandum had been addressed to the company's general counsel and forwarded to the respective executives.

The May 28 interview with Gulf personnel was held in Denver. At the request of Gulf personnel, Dr. I. C. Bupp of the Harvard Business School also attended the sessions. (Clark, ¶ 9). Dr. Bupp was connected with Management Analysis Center, Inc. (MAC), a business consulting group employed by API to compile a publishable report on the desirability and economic impact of the horizontal divestiture legislation.

At least seven Gulf executives, and Gulf's regional attorney, attended the May 28, 1976 meeting. Mr. Mingee, who arranged the meeting and attended as a Gulf Vice-President, provided his contemporaneous understanding of the expected tenor and scope of the interviews in a May 27 intra-office memo to the other participants. In the memo he noted that Kirkland "has been hired by API to prepare material for congressional hearings on horizontal divestiture" and that "Dr. I. C. Bupp is working with API on the same subject." (Mingee Exh. B).

Mingee expressed his hope that their questions could be satisfactorily answered "through an informal discussion," since the preparation of written answers "may complicate the subject severely because undoubtedly it would require time consuming approvals at higher levels, perhaps even Pittsburgh." (*Id.* Exh. B).

For the description of the topics discussed on May 28, we refer to the uncontradicted affidavit of Nolan Clark. (See Clark Aff., ¶ 12). Clark confirmed his recollection of the meeting with Dr. Bupp. At the beginning of the discussion, Clark was introduced as an attorney for API. Mr. Allen, Gulf's regional counsel, suggested that discussion focus first on legal consequences of divestiture, such as bank approval of the sale of assets, performance guarantees, and the handling of retirement liabilities. After Mr. Allen left, Dr. Bupp asked questions on uranium pricing and marketing, including how Gulf set uranium prices. Gulf personnel responded that they relied on published data for uranium prices. According to Clark, this was the substance of the uranium pricing discussion, and all questions on that subject were posed by Dr. Bupp. Clark has submitted his notes of the meeting to the court for *in camera* inspection in order to protect any proprietary information, and although they are in a cryptic and abbreviated form, they suggest that the discussion included consideration of capital investments, production costs, and exploration expenditures in Gulf's uranium, coal, oil, oil shale and gas industries. The entire meeting lasted more than two hours.

Nolan Clark's interview with Kerr-McGee officials took place in Oklahoma City on June 9, 1976. Those officials were R. J. Hefler, Kerr-McGee's Vice-President for Public Services, and George Cobb, Executive Vice-President. Mr. Cobb was chosen because of his long experience with the company and his extensive knowledge of uranium and coal. (Hefler, ¶ 11). Clark, Cobb and Hefler were the only persons present during the interview. No Kerr-McGee lawyers attended. At the outset

of the meeting, in response to a question about Clark's affiliation and the purpose of the meeting, Clark told Cobb and Hefler that pursuant to Kirland's retention by the API on the horizontal divestiture legislation he was interviewing industry personnel to analyze the probable consequences of the legislation. (Clark, ¶ 14; Hefler, ¶ 12). Hefler understood Clark to explain that Kirkland was working on behalf of API and also its members such as Kerr-McGee. (Hefler, ¶ 12). Clark denies he made any statement that Kirkland was working on behalf of any of the API's member companies and knows of no basis for Hefler's belief that Kirkland was representing Kerr-McGee. Neither Cobb nor Hefler expressed that belief during the meeting, according to Clark's recollection. (Clark, ¶¶ 14, 16). Both Clark and Hefler agree that Clark made assurances that the information disclosed during the interview would be held in confidence, but Hefler asserts that that assurance extended to all information, while Clark claims it extended only to proprietary information, which could be disclosed in aggregate form, in conformity with earlier written communications from Stark Ritchie.

Both Clark and Hefler agree that the conversation focused on the legislation's impact on Kerr-McGee uranium and coal assets, which it would be forced to divest. (Hefler, ¶ 13; Clark, ¶ 15). Clark was given considerable background information on Kerr-McGee's uranium industry, including mining locations, uranium conversion process, and pellet fabrication. Clark states that virtually all the information provided was publicly available. (Clark, ¶ 15). On the subject of uranium marketing and pricing, Cobb described the escalating prices and tightening supplies in the current market, and the reasons behind the trends. (Hefler, ¶ 13). The session lasted about three hours.

As noted earlier, Kirkland did not interview any Getty personnel. However, Getty received the confidential API questionnaire which requested Getty to estimate the value of its assets subject to proposed divestiture and its research and

development outlays in alternative energy fields. Getty completed the questionnaire and mailed its data sheets to Nolan Clark on June 4, 1976, with the understanding that the data would be held in confidence. (Copley aff., ¶ 3). Getty's Vice President states that in submitting the data, he "acted upon the belief and expectation that such submission was made in order to enable [Kirkland] to render legal service to Getty in furtherance of Getty's interests." (Copley, ¶ 7). In opposition to this statement, Clark asserts that he knows of no basis for Copley's belief and expectation, that he never even suggested that the data was to be used except for Kirkland's report for API, and that Copley's belief was never expressed to him during the course of the study. (Clark, ¶ 23).

Gulf submitted financial information and its completed questionnaire to Kirkland on August 10, 11 and 13, 1976. (Mingee, ¶¶ 10, 11, 12). In each instance, Mr. Mingee stated in his cover letter that Gulf supplied the information on a confidential basis with the understanding that it would be aggregated in the industry and that it would not be reported separately without Gulf's prior written consent. (Mingee Exh. E, F, and G).

Kerr-McGee sent its completed questionnaire to Nolan Clark on August 25, 1976. (Hefler, ¶ 16).

In his affidavit, Nolan Clark explains that the questionnaires were sent directly to him in order to protect any data which the oil companies classified as proprietary information. (Clark, ¶ 17). This procedure eliminated the possibility that industry competitors could obtain the data through API. Clark states that none of the submitted data was used in the API report except in aggregate form. (Clark, ¶ 20). Clark asserts that except for the aggregated data on oil company assets and research and development expenses in alternative energy fields, all quantitative data used in the API report was derived from publicly available sources. (Clark, ¶ 28). He also reveals that

some oil companies, such as Gulf, were receiving requests for data on their research and development outlays from the MAC group as well as API. (Clark, ¶ 21-22). The MAC survey form asked for some of the same data as was requested in the API questionnaire, although it is somewhat less comprehensive. (Clark, Exh. A, Attachment B). In addition, Clark sent to Gulf a request from First Boston Corporation for financial information on the coal interests of oil companies, a subject which was also partially included in the API survey. (Clark, ¶ 24). Gulf eventually supplied some or all of the requested data, and First Boston summarized its findings at a public symposium.

The final disposition of the oil company data sheets was settled in October, 1976. During their work on the API report, Rowe and Clark became concerned that legislative committees might subpoena the data sheets and that Kirkland might not be able to resist disclosure to Congress. (Clark, ¶ 25). Therefore, they decided to return the API questionnaires to the companies when the report was completed. This decision was conveyed to Stark Ritchie on October 15, the same day the final report was submitted to the API. The Ritchie letter does not contain Clark's currently proffered rationale for the return of the data. (Clark, Exh. E). The questionnaires were ultimately returned to Gulf, Getty and Kerr-McGee on October 29, 1976.

Before its October 15, 1976 release date, the API report went through several drafts, which were sent to some API members for review and comments (Clark, ¶ 26). Both Hefler (Kerr-McGee) and Thurmond (Gulf) received copies of the drafts. (Hefler ¶¶ 15, 18; Thurmond, ¶ 9). For our purposes, we find it unnecessary to discuss the content of the preliminary versions of the API report.

The final API report is a voluminous document, containing some 230 pages of text and supported by 82 pages of exhibits. A major section of the report is devoted to a description of oil company participation in various energy fields, including coal, uranium, geothermal energy, oil shale, tar sands, synthetic fuels

from coal, and solar energy. Other sections analyze United States energy requirements, examine and criticize the arguments put forward in support of the horizontal divestiture bill, describe the legislation's negative impact on the economy and on energy production, and evaluate the legislation's lack of harmony with antitrust principles, historical lessons and public policy. Uranium is the primary subject of about 25 pages of text and 11 pages of exhibits. References to uranium appear throughout the report.

On the same day that the final API report produced by Kirkland's Washington office was published, Kirkland's Chicago office filed the present complaint on behalf of Westinghouse against 29 uranium producers, including Kerr-McGee, Getty and Gulf. A comparison of the two documents reveals a rather basic conflict in their contentions and underlying theories. Because a major argument behind the divestiture legislation was that oil company participation in alternative energy fields creates anti-competitive pressures on the economy, the report marshalls a large number of facts and arguments to show that oil company diversification does not threaten overall energy competition. In particular, the report asserts that the relatively high concentration ratios in the uranium industry can be expected to decline (III 20-21), that current increases in uranium prices are a result of increasing demand (III 22-23), that oil company entry into uranium production has stimulated competition (V 10, 29) and diminished concentration (V 12, VI 13), that oil companies have no incentive to act in concert to restrict coal or uranium production (VI 18-19), and that the historical record refutes any charge that oil companies have restricted uranium output. (VI 24). The report concludes that "the energy industries, both individually and collectively, are competitive today and are likely to remain so." (VI 34). In contrast, the major theory of the Westinghouse complaint is that uranium producers such as Gulf, Getty and Kerr-McGee have conspired to destroy competition in uranium marketing and pricing. To that end, they have allegedly coordinated

production, withheld uranium from the market, fixed prices at artificially high levels, and generally suppressed competition in uranium marketing. Perhaps in recognition of the diametrically opposing theories of the API report and the Westinghouse complaint, Kirkland does not attempt to rebut the oil companies' charges that it has simultaneously taken inconsistent positions on competition in the uranium industry.

The prominence of this conflict is more easily discerned from the documents themselves than from the contemporaneous activities of the Kirkland firm. Not only did completely different Kirkland attorneys work on the two matters, but the attorneys were segregated between the Washington and Chicago firms. In addition, Kirkland's investigation of antitrust violations by uranium producers was treated as a highly confidential matter, which was not disclosed even within the firm to anyone not directly involved in the Westinghouse matter. Securities law dictated that public disclosure of the possible antitrust lawsuit be prevented. (Jentes, ¶ 15). Consequently, although the Washington office did know of Kirkland's representation of Westinghouse on the utility contracts litigation, none of the Washington attorneys working on the API divestiture assignment knew of the separate Westinghouse antitrust complaint until it was filed in court on October 15, after the stock exchanges closed on that day. (Rowe, ¶¶ 8-9; Clark, ¶ 29). The Chicago attorneys also had little awareness, if any, of the API work by the Washington office. Although the attorneys working on the Westinghouse complaint do not profess complete ignorance of the API representation by their brothers in Washington, they state that they did not communicate with the Washington attorneys about the API work prior to October 15 and had no knowledge of the data collected for the API report. (Jentes, ¶ 17; Locke, ¶ 3; Newton, ¶ 17; Sonda, ¶ 14; Wilson, ¶ 3; Bartlit, ¶ 10; Goold, ¶ 5; Haubold, ¶ 4). Nolan Clark and Frederick Rowe confirm that they never disclosed any information from the API questionnaires or interviews to any lawyer in the Chicago office. (Clark, ¶ 30; Rowe, ¶ 25).

There is one partial overlap between Chicago and Washington attorneys in connection with the API anti-divestiture efforts. The overlap involves the work of William Jentes, who was one of Kirkland's lead attorneys working on the Westinghouse antitrust complaint. In August, 1976, L. Bates Lea, as head of API's Legal Task Force on the divestiture legislation, arranged for Jentes to prepare a legal memorandum analyzing arguments which had been advanced to broaden the scope of existing antitrust laws to outlaw interlocking directorates. (Jentes, ¶ 16; Lea, ¶ 8). The issue had been raised by proponents of the divestiture legislation as an example of the collusive behavior of large corporations. Since Lea's own legal staff at Standard Oil was fully committed on other matters, Lea farmed out the task to Kirkland. (Lea, ¶ 8). Lea forwarded the Kirkland memo to the API, which mailed it to its company contacts on September 23, 1976. Kirkland's fees were paid by Standard, and no Kirkland attorney working on the memo had any contact with any API representative except Lea. (Jentes, ¶ 16). The memorandum addresses the antitrust issues from a predominantly theoretical perspective, and does not contain one word on uranium. (Hefler, Exh. 13).

In view of this rather rigid separation between Kirkland attorneys working on the Westinghouse antitrust complaint and the API report, it is understandable that officials of Getty, Gulf and Kerr-McGee state that they were never told by Clark or Rowe that Kirkland was considering an antitrust action against those companies, and were never told of any possible conflict between Kirkland's dual engagements. (Thurmond, ¶ 8; Cody, Rebuttal Aff., ¶ 4; Copley, ¶ 5; Heimann, ¶ 5; Hefler, ¶ 14). A Gulf official maintains that if he had been aware of such facts, he would not have released the data in the API questionnaire to Kirkland. (Copley, ¶ 5).

Following the filing of the Westinghouse complaint and the publication of the API report, Kirkland and API personnel

made a number of efforts apparently intended to minimize the possibility of a conflict of interest. On October 20 Stark Ritchie, API's General Counsel, telephoned William Heimann, General Counsel of Kerr-McGee, to report that he had been assured by Fred Rowe that no Kerr-McGee data obtained for the API report had been or would be made available to Kirkland attorneys working on the Westinghouse case. (Heimann, Exh. A). Rowe confirms this conversation with Ritchie. (Rowe, ¶ 12). In mid-November, 1976, L. Bates Lea, head of the API Legal Task Force, called Ralph Copley, Getty's Chief Counsel, to state his belief that no conflict existed since the Westinghouse complaint made specific § 1 Sherman Act charges while the API work was a defense of the industry's structural posture. (Copley Rebuttal Aff.). In a December 7, 1976 letter to Ritchie, Rowe concurred with Lea's belief that no conflict existed, explaining that the API and Westinghouse matters dealt with completely different legal approaches to the application of antitrust principles, namely across-the-board legislative restructuring as opposed to case-by-case judicial enforcement. He added, however, that "to avoid any appearances of a possible future conflict," Kirkland should not advise API on uranium marketing and pricing matters during the pendency of the Westinghouse lawsuit without prior consent by both clients. (Rowe, Exh. C). Westinghouse has concluded that no conflict exists. (Pugliese, ¶ 5). And on December 1, 1976, the API's General Committee on Law discussed the conflict problem and reached a consensus that Kirkland's Washington office should continue to advise the API on the divestiture legislation. (Thurmond Rebuttal Aff., ¶ 3). There is a sharp dispute between two members present at the meeting whether the Committee concluded that no conflict existed. Chairman Lea says yes (Lea, ¶ 9) and member Thurmond says no (Thurmond, ¶ 3). Kerr-McGee denies that the API committee has any power to issue a binding decision on this issue. (Cody Rebuttal Aff., ¶ 7).

There is one additional chronological strand of facts which runs alongside the history of Kirkland's API representation and which Kirkland deems significant to the oil companies' present charges of conflicting interests. Kirkland traces its representation of Westinghouse on the utility contracts litigation back to January, 1976 and describes its discovery requests in that case which were directed against the oil company movants. Kirkland asserts that during these contacts Kirkland attorneys consistently identified their Westinghouse affiliations and made numerous inquiries which put the companies on notice as to their investigation of a possible antitrust conspiracy in uranium pricing. Kirkland points to these encounters as evidence of its adversary stance with the oil companies and as evidence that no attorney-client relationship existed between Kirkland and the companies.

As noted earlier, Westinghouse is defending the utility contract action in the Eastern District of Virginia on the theory that unforeseen intervening circumstances regarding the price and supply of uranium rendered performance of its uranium supply contracts "commercially impracticable" under Section 2-615 of the Uniform Commercial Code. One of the intervening circumstances that Westinghouse has alleged in its answers to the complaints is an illegal agreement among uranium producers to manipulate the price and availability of uranium. *In Re Westinghouse Electric Corporation Uranium Contract Litigation,* 436 F.Supp. 990, 995 (Jud.Pan.Mult.Lit. 1977). The Judicial Panel recognized "that the allegations of a uranium price-fixing and market manipulation conspiracy in [the present case] and the actions in [Virginia] involve common questions of fact . . . " *Id.*

In developing evidence for its defenses in the contract actions, Kirkland's Chicago attorneys working on the Westinghouse case embarked on a program to meet with uranium producers and others to gain knowledge of the uranium market. (Jentes, ¶ 10; Newton, ¶ 3; Sonda, ¶ 2). As part of this

evidence-gathering effort, these Kirkland attorneys, mainly George Newton and James Sonda, contacted, deposed or sought discovery from agents of each of the three oil companies which have moved for Kirkland's disqualification. (Newton, ¶ 4).

On January 16, 1976, Sonda and Newton met for three hours with Mr. Peterson of the Getty legal staff and two Getty employees at company headquarters in Los Angeles. One of the employees was Dr. Siegfried Muessig, whom Kirkland believed had knowledge of the uranium market. At the outset of the meeting, Sonda and Newton identified themselves as Kirkland attorneys representing Westinghouse. According to their recollection, the discussion touched upon the March, 1973 meeting of uranium producers at Oak Brook, Illinois, which is identified in Westinghouse's present anti-trust complaint as one phase of the uranium producers' conspiracy to demand and quote higher uranium prices. The participants also discussed statements by producers, including Getty, that uranium price increases were needed and probed the reasons behind the statements. (Newton, ¶ 5; Sonda, ¶ 3). Mr. Peterson, Getty's attorney, has a somewhat different recollection of the meeting. He understood that Kirkland's theory for its defense of commercial impracticability rested on a number of economic factors which contributed to uranium price increases, including the Arab oil embargo, Atomic Energy Commission policies, and governmental action of foreign uranium producing countries. He was told that Kirkland only wanted to discuss past and current projections of uranium supplies and prices, and heard no intimations that Kirkland saw conspiratorial conduct of uranium producers as a factor in the price increase. (Peterson Aff.).

On July 13, 1976, Kirkland served a deposition subpoena on Dale Cooper, a Getty employee who presented a paper at Oak Brook on the need for increased uranium prices. (Newton, ¶ 12). The subpoena requested Cooper to produce documents reflecting communication with other uranium producers on

"... uranium prices or market conditions or the ability or inability of any producer to supply uranium to any customer." (*Id.*) At the deposition, during which Getty counsel were present, Sonda questioned Cooper at length about his participation in the Oak Brook meeting. (Sonda, ¶ 4). Cooper was directed not to answer any questions relating to the market analysis and price predictions made within his department since the late 1960's. (Newton Exh. 6). Although the parties had earlier agreed to limit the scope of the documents under subpoena, the documents eventually produced were unsatisfactory to Kirkland attorneys. (Newton, ¶ 13).

On August 30, 1976, Kirkland served a subpoena *duces tecum* on Dr. Muessig of Getty, again seeking to discover documents relating to price communication with other producers and to the Oak Brook meeting. (Newton, ¶ 14; Sonda, ¶ 5). Getty again objected to the subpoena. Discussions ensued between Getty and Kirkland attorneys. Sonda explained that efforts by the uranium producers to raise prices and restrict supply were highly relevant to Westinghouse's defense to the uranium contracts. (Sonda, ¶ 6). Getty attorneys speculated that Kirkland would use the information to prepare an antitrust suit against Getty, and they told Getty on September 19 that they would not comply unless they knew whether an antitrust action was in the offing. (Schuck, ¶ 5; Newton, ¶ 14). Getty's lead attorney, Carl Schuck, states that up to that time they had no express indication from Kirkland that Getty was the possible target of an antitrust action. (Schuck, ¶ 5). Coterminous with this perception, however, Sonda had no indications from Getty that Getty considered itself to be a client of Kirkland. (Sonda, ¶ 10). On September 23 or 24, Newton called Schuck and told him that the activities of the foreign and domestic uranium producers were a necessary part of the Westinghouse litigation and that he could not assure Getty that no antitrust suit was contemplated. (Newton, ¶ 14; Schuck, ¶ 6). At that point, Schuck advised Getty to proceed on the assumption that it was a potential target. (Schuck, ¶ 7). Schuck eventually agreed to

a limited response to the August 30 subpoena. (Sonda, ¶ 9). Schuck states that the antitrust potentiality materially affected his attitude of accommodation on Kirkland's discovery requests. (Schuck, ¶ 5).

The Cooper deposition was part of an intensive discovery effort by Kirkland between June, 1976 through the filing of the antitrust complaint to isolate the existence of an antitrust conspiracy among American uranium producers. During that time, 15 depositions of uranium producers were taken and tens of thousands of documents were examined. (Jentes, ¶ 10). By early September, 1976, the overall picture of the alleged conspiracy had taken fairly definite form with Kirkland attorneys. (Jentes, ¶ 11). As will appear below, Kerr-McGee employees were also the target of this pre-October discovery effort.

Kirkland's contacts with Kerr-McGee officials, as with Getty officials, began in January, 1976. At that time, Sonda asked Kerr-McGee's General Counsel, William Heimann, if Kirkland could interview two company executives, Corporation Chairman Dean McGee and Executive Vice-President George Cobb. (Sonda, ¶ 11). A January 12 letter from Sonda to Heimann stated that McGee's views would be helpful in illuminating ". . . price and supply expectations prior to 1973 . . . and the possibility of a uranium shortage in the next few years." (Sonda, Exh. 1). Dean McGee confirms that the discussions were to focus on past and future trends in the uranium industry and were connected with Westinghouse's defense of its uranium contracts. (McGee, ¶¶ 3, 4).

The meeting took place as scheduled on February 19, 1976 at Kerr-McGee headquarters in Oklahoma City. Present at the meeting were Sonda, Newton, Cobb, McGee, a Kerr-McGee in-house attorney, and Richard Zitting, President of Kerr-McGee Nuclear. (Newton, ¶ 10; Sonda, ¶ 12; McGee, ¶ 3). They recall that "among the topics discussed were the reasons behind the dramatic uranium price increase, Mr. McGee's prior

testimony before the Joint Committee on Atomic Energy concerning meetings of foreign uranium producers, the lack of response by uranium producers to bid requests and the failure of foreign uranium producers to under-cut United States producers in sales to United States purchasers." (Sonda, ¶ 12; Newton, ¶ 10). While McGee does not dispute this account, he states that there was no suggestion that Kirkland was investigating the possibility that any uranium producers had conspired to restrain trade. (McGee, ¶ 5). He also perceived no hint that Westinghouse's interests were adverse to his company, and saw the meeting merely as a vehicle to provide background information to one of Kerr-McGee's customers (Westinghouse). (McGee, ¶ 6). On the other hand, Newton and Sonda similarly received no indication from the interviewees that they believed Kerr-McGee to be a client of Kirkland. (Sonda, ¶ 13; Newton, ¶ 18).

On July 26, 1967 [1976], Kirkland served a deposition subpoena on Mr. Zitting, President of Kerr-McGee Nuclear. (Newton, ¶ 15; Haubold, ¶ 7). The subpoena requested Kerr-McGee to produce documents relating to its communications with other uranium producers concerning "uranium prices and market conditions or to the supply by you of, or your inability to supply, uranium to any customer." (Haubold, ¶ 7). Three days later, one of Kerr-McGee's Chicago lawyers asked Newton for background information on Westinghouse's contracts litigation, and Newton responded by sending him copies of the complaints and answers in all 14 cases. (Newton, ¶ 15). On September 20-21 and October 10-11, Mr. Zitting attended the deposition and was questioned at length about price and supply communications among uranium producers. (Haubold, ¶ 7).

Unlike the contacts between Kirkland's Chicago attorneys and Kerr-McGee and Getty, the pre-October encounters with Gulf personnel were brief and unproductive. On February 12, 1976, after telephone conversations, Newton met in Denver with a Gulf attorney, Mr. Allen. Mr. Newton identified his

Kirkland affiliation and discussed the current status of the Westinghouse litigation. (Newton, ¶ 9). He then asked to interview Gulf employees involved in its uranium activities, but Allen refused to allow any interviews. It does not appear that Kirkland made any further moves to investigate Gulf activities until October 26, 1976, when it subpoenaed documents on Gulf's participation in an Australian meeting of the alleged uranium "cartel." During the meeting Gulf allegedly laid plans to block Westinghouse's efforts to purchase low-cost Australian uranium. (Jentes, ¶¶ 12-14). Depositions of key Gulf officials did not begin until late December 1976, during the trial of one of the uranium contract cases in Pennsylvania state court. (Jentes, ¶¶ 12-13).

With this factual background in perspective, we now turn to an analysis of the legal theories presented by the parties. The oil companies contend that Kirkland was the attorney for not only the API, but also those members like Kerr-McGee, Getty and Gulf which openly opposed the divestiture legislation and confidentially consulted with Kirkland to provide data for the API report. They emphasize the promises of confidentiality and non-disclosure which permeated the data-collection process, and the relevance of the company discussions on their uranium holdings to the present Westinghouse litigation. They conclude that Kirkland's representation of Westinghouse in the present antitrust action against them violates Canons 4, 5 and 9 of the Code of Professional Responsibility, which prohibit the actual or potential disclosure of client confidences, ban the representation of adverse interests in substantially related litigation, and require attorneys to avoid the appearance of impropriety.

Kirkland's basic defense is that its only attorney-client relationships have been with Westinghouse and API, not the member oil companies. Kirkland stresses the absence of any explicit evidence documenting the existence of such a relationship with Getty, Gulf or Kerr-McGee, and points out that its

course of dealing with those corporations during its discovery efforts in the uranium contracts litigation put those companies on notice of its attempts to support Westinghouse's antitrust defenses in the Virginia lawsuits.

We find that our decision on the oil companies' disqualification motions turns upon the existence of an attorney-client relationship between them and Kirkland. Because the duties of loyalty and confidentiality adhere to the fiduciary relationship between an attorney and his client, one who seeks to disqualify opposing counsel based on a violation of those duties must show that such a relationship exists or has existed with him during a current or earlier representation. *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977); *In Re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 90 (5th Cir. 1976); *American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971).

An attorney-client relationship is one of agency to which the general rules of agency apply. *Brinkley* v. *Farmers Elevator Mut. Ins. Co.*, 485 F.2d 1283, 1286 (10th Cir. 1973); Restatement 2d Agency § 1, comment e (1958); 7 C.J.S. Attorney and Client § 67. The relationship arises only when the parties have given their consent, either express or implied, to its formation. *Committee on Professional Ethics & Grievances* v. *Johnson*, 447 F.2d 169, 174 (3d Cir. 1971). The client must manifest his authorization that the attorney act on his behalf, and the attorney must indicate his acceptance of the power to act on the client's account. Restatement 2d Agency, § 15. These manifestations may be made by words, either written or oral, or may be inferred from other conduct, including acquiescence.

The movants concede that explicit evidence of their alleged attorney-client relationship with Kirkland is lacking. The affidavits are devoid of any written or oral request by any oil company representative that Kirkland act as its attorney, of any written or oral acceptance of such representation by Kirkland, and of any direct payment of legal fees by the movants to

Kirkland. All the contemporaneous documents prepared in connection with the API report state that Kirkland was retained by API, and make no reference to API members as Kirkland's clients. Kirkland sent its legal bills to the API, and was compensated only by the API.[1] (Rowe, ¶ 4).

Recognizing the absence of express manifestation, the oil companies fall back on the accepted principle that the relation of attorney and client may be implied from the conduct of the parties. *E. F. Hutton & Co.* v. *Brown*, 305 F.Supp. 371, 388 (S.D.Tex. 1969). In the typical case, such conduct includes the preparation of a legally-binding document like a contract or a will, or the attorney's appearance in a judicial or quasi-judicial proceeding. Again, these indicia are absent here. We therefore refine our inquiry to a search for evidence of what we believe are three fundamental characteristics of an agency relationship. We caution, however, that because the overarching requirement is the existence of a consensual agreement between the parties, these characteristics are to be weighed as circumstantial evidence that an agreement does or does not exist, and not as conclusive determinants of an agency relationship.

The first characteristic indicative of an agency relationship is that an agent has the power to affect the legal relations of the principal and others. Restatement 2d of Agency, § 12. Here Kirkland's express authority was to prepare a report to be used as source material for congressional testimony and public advocacy. The firm's involvement was that of an expert consultant and researcher. Kirkland was not empowered to effectuate any legally-binding documents or to prepare for

[1] The oil companies paid dues to the API which were then used indirectly to pay Kirkland's legal fees, but these dues are hardly evidence of an attorney-client relationship with Kirkland, since this manifestation by the claimed principal was directed toward a third party, not the purported agent, and therefore is irrelevant to the existence of a consensual agreement between them.

litigation on behalf of either the API or the oil companies. Hence, the absence of typical legal powers undermines the existence of an attorney-client relationship with both entities. It is therefore not helpful in inferring the existence of a consensual agreement between Kirkland and the oil companies.

The second characteristic is that an agent is a fiduciary who works on behalf of his principal and primarily for his benefit. Restatement 2d of Agency, §§ 1, 13. The understanding that one is to act primarily for the benefit of another is often the determinative feature in distinguishing the agency relation from other relations. *Id.*, § 13 comment b. There are three entities claiming the status of principals here—API, Westinghouse, and the oil companies. Kirkland says it worked only on behalf of the first two, and the oil companies say Kirkland worked for all three. It is fairly clear that the API report inured primarily to the benefit of the oil company members. Only those companies, not the API, had property interests or land holdings in alternative energy resources which were financially threatened by divestiture plans. However, if we view the situation in terms of working relationships rather than ultimate benefits, the result is less certain. The API is an independent corporate entity with responsibilities for a number of substantive programs. It is not a mere mouthpiece for its members' interests. Its anti-divestiture campaign was an industry-wide cooperative effort in which the API has substantial leadership and coordination responsibilities. Kirkland arranged the corporate interviews and the questionnaire survey through API's offices, and API communications to its members were explicit in describing Kirkland as "independent special counsel for API." On the other hand, these actions and communications are not necessarily inconsistent with a claim of representation by the oil companies, since their interests coincide with those of the API, and an attorney can work for multiple clients when their interests are harmonious.

Another series of events must be factored into the question of whether Kirkland worked for and on behalf of the oil companies. While Kirkland's Washington office was preparing the API report, its Chicago attorneys were seeking discovery against those companies to bolster Westinghouse's defenses to the uranium contracts lawsuits. In each contact with top corporate executives or company counsel, Kirkland attorneys told the oil companies they represented Westinghouse in that litigation. In the case of Getty and Gulf, those discovery forays were viewed with circumspection, limited accommodation, or even outright resistance. These reactions support the view that the Kirkland firm, when its branch offices are considered as a unitary whole, stood in a quasi-adversary posture *vis-a-vis* the oil companies. Even Kerr-McGee's discovery responses, although they were more cooperative than Gulf's or Getty's, were seen by the company as background information for one of its uranium customers, not as fuel for Kirkland to use in furthering Kerr-McGee's interests. The oil companies attempt to discount this whole series of discovery encounters on the grounds that they saw no adversity in Westinghouse's discovery requests, did not have reason to suspect that Westinghouse was investigating an antitrust conspiracy among uranium producers, and were not told by Kirkland that they were potential defendants in a Westinghouse lawsuit. However, we see this evidence not as an attempt to prove the oil companies' awareness of and acquiescence in Kirkland's conflicting position on competition in the uranium industry, but as tending to prove that Kirkland was not acting on behalf of any discrete or particularized oil company interests, i.e. those of Getty, Gulf or Kerr-McGee.

The final evidence to be considered in conjunction with the second characteristic of agency relationships are the confidentiality agreements which accompanied Kirkland's data-gathering activities. The oil companies rely heavily on these agreements. They contend that when they submitted their top executives to in-depth interviews by Kirkland on uranium

matters under repeated assurances of confidentiality, and submitted confidential financial data on the questionnaire with the same assurances, an attorney-client relationship was created between them and Kirkland. Since corporations do not normally submit confidential information to persons who intend to work against them, it is possible to infer that the transfer of information and a promise of confidentiality is evidence that an agency relationship exists between the communicants. But the inference is a tenuous one. The agency relationship is founded on the manifest agreement of the parties, not on the content of the information disclosed between them. The fiduciary duties of confidentiality, loyalty and obedience are consequences of a properly formed relationship, not the origin of one. The danger of allowing the tail to wag the dog is real. Nevertheless, we see some probative value in confidentiality agreements, if they tend to show that an attorney-client relationship existed. The problem here is that the confidentiality agreements were not designed to protect the oil companies' information from disclosure in legal or judicial settings. The oil companies did not repose confidence in Kirkland in order to more fully prepare a legal defense or to receive better legal services. Instead, the agreements were designed to protect the oil companies' proprietary information from disclosure to other business competitors who were also members of API. Kirkland acted as a neutral clearinghouse for the aggregation of commercial assets. The agreement prohibited disclosure "to any other company, or even to API," because API's possession of the information could be transmitted to competitors through their representatives in API's organizational hierarchy. Therefore, the confidentiality agreements are more probative of the companies' concern for the preservation of commercial advantage than of their status as clients of Kirkland.

In sum, as far as the second criteria for an implied agency relationship is concerned, the evidence is conflicting and ambiguous. The report clearly benefitted the oil companies, but Kirkland's working relationships were defined largely by the

API alone. Kirkland's discovery efforts on behalf of Westinghouse undermine its alleged status as the companies' attorney. And the confidentiality requirements accompanying the API study are consistent with a desire for protection of commercial secrets as well as with the possible existence of an attorney-client relationship.

With these inconclusive indicators in mind, we turn to the third characteristic of an agency relationship, that is, the fact that a principal has the right to control the conduct of the agent. Restatement 2d of Agency, § 14. An agent's continuous subjection to the will of the principal is a critical element of agency agreements. *Id.*, § 1, comment b. In the case of attorneys, although the principal may have agreed to allow the attorney an unlimited discretion, he nevertheless has the power to give lawful directions which the attorney is under a duty to obey. *Id.*, § 14, comment b.

The evidence in the present case demonstrates that the right of control over Kirkland's work rested almost entirely with the API, not the oil companies. Although Kirkland's status as an "independent expert counsel" weakened its submission to external controls, it still received all its marching orders and directions from the API Legal Task Force. The idea of a Kirkland study originated with L. Bates Lea, head of the Task Force. The parameters of Kirkland's work, including its scope, topic, and source material, were defined by Stark Ritchie, who was Lea's assistant as well as API's General Counsel. (Ritchie Exh. 2). Most importantly, the confidentiality requirements were initially imposed by Ritchie, not by the oil companies. (*Id.*). Ritchie also arranged for interviews with a cross-section of industry personnel, and prepared the memorandum which accompanied the questionnaire to 59 of API's corporate members. In addition, the API published and distributed the final report. As against this picture of API control, the power of the oil companies to influence the shape of the API report is meager. The companies were sent the preliminary drafts of the

report, and were invited to submit their comments and written suggestions. Those comments were not to be sent to Kirkland directly, but were referred through James A. Atkin, who was the Project Director of the API Committee on Industrial Organization. (Hefler Exh. 10, 4). In addition, in submitting its completed questionnaire, Gulf reiterated Ritchie's earlier directive on confidentiality.

Viewed in its totality, we believe the evidence shows that no attorney-client relationship has existed between Kirkland and the oil companies. Explicit indications of an agreement to act as attorney and client are lacking, and Kirkland's preparation of a legislative report for a large trade association carries few implied indicia of legal representation for the contributing members. When the three essential elements of an agency relationship are applied to the present facts, they are either not helpful at all, ambiguous, or contrary to the companies' positions. Executives of the oil companies repeatedly assert their present belief that an attorney-client relationship existed, but "agency is a legal concept which depends on the manifest conduct of the parties, not on their intentions or beliefs as to what they have done." *Interocean Shipping Co.* v. *National Shipping and Trading Corp.*, 523 F.2d 527, 537 (2d Cir. 1975). The contemporaneous statements of the parties, as reflected in the letters and memoranda in the record, all lead to the conclusion that Kirkland did not represent the oil companies.

As noted earlier, the absence of an attorney-client relationship is typically the death-knell of a motion to disqualify. We agree, at least insofar as any violations of Canons 4 and 5 are concerned. Those Canons presume and preserve the duties of confidentiality and loyalty which adhere in the attorney-client relationship. However, the defendants have also invoked the broad injunction of Canon 9 against the "appearance of professional impropriety." That Canon covers the entire spectrum of an attorney's professional life and may support a motion to disqualify even without proof of actual wrongdoing. *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977).

We believe that there is some evidence of a Canon 9 violation, even without proof of a formal attorney-client relationship. The claim of such a relationship is more than colorable, and the conflicting positions of Kirkland on competition in the uranium industry are clear. In addition, the transmission by the oil companies of confidential information on their uranium industries and assets has given rise to justifiable fears that their disclosures will return to haunt them in the present litigation. The acquired information appears to be closely related to the subject matter of the Westinghouse complaint. An attorney should not place himself in a position where he will or might be tempted to take advantage of information derived from confidential interviews. *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972). In addition, the communications between Kirkland, the API and the oil companies after October 15 show that even Kirkland recognized the questionable character of its conduct. Conscious of the need to preserve public confidence in the legal profession, we are reluctant to exonerate Kirkland for what appears to be an error in professional judgment.

Nevertheless, we are equally reluctant to take the extreme step of disqualification to remedy a Canon 9 violation by itself, especially in a case of the present complexity and magnitude. Canon 9, unlike Canons 1-8, is primarily aspirational in character. Its language is all-inclusive, perfectionist, and unmerciful. But at the same time, its command is less comprehensively supported by the disciplinary rules which the bar has drafted to implement and give teeth to the Canons. While courts have disqualified attorneys under the appearance of impropriety doctrine even without evidence of actual wrongdoing, their decisions have typically rested on one of these disciplinary rules. *See, e.g., General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974). Kirkland's apparent impropriety does not fit within any of Canon 9's disciplinary rules. Instead, it falls in the twilight zone of ethical transgressions, where black-letter rules blur into grayish hues. In these situations, a

mechanical application of Canon 9 is to be avoided, lest the harm to the client and the judicial system outweigh the value of the presumed benefits. *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288, 1293, 1295 (2d Cir. 1975). The unnecessary disqualification of an attorney under an overly broad application of Canon 9 may unfairly deny a litigant counsel of his choice, thereby contributing to public suspicion of the bar and the judiciary. *Woods* v. *Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). In an attempt to give objective and pragmatic content to Canon 9, the following test has been offered: an attorney should be disqualified under Canon 9 only when "there is a reasonable possibility of improper professional conduct" and "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 813, n.12.

The crux of the oil companies' charges of impropriety rest upon the receipt of confidential information by attorneys in the Washington branch of the Kirkland firm who prepared the API report and their presumed disclosure of those confidences to attorneys in Kirkland's Chicago office who were handling the Westinghouse litigation. In cases where courts have found a disclosure of client information to one member of a law firm, such knowledge has traditionally been imputed to all members of his firm. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976). However, recent decisions have occasionally rejected this rigid approach, in recognition of the changing realities of modern legal practice. As Judge Weinstein aptly noted in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 370 F.Supp. 581, 588 (S.D.N.Y.1973), *aff'd* 518 F.2d 751 (2d Cir. 1975):

> "Since the largest firms represent the largest corporations with interests in all sectors of the economy, it is almost impossible to have an important client or its subsidiary

> avoid some kind of legal relationship with another client at some time. *Cf.* E. O. Smigel, The Wall Street Lawyer 234 (1964). 'Where a firm represents concurrently conflicting interests, the practice is sometimes followed of "splitting up" the firm into separate teams of lawyers, each of which represents one of the antagonistic clients.' (Citations omitted) The fact that attorneys within the firm are effectively insulated from exposure to the confidences of other clients where necessary demonstrates the inappropriateness of an invariable mechanical imputation of knowledge."

In *City of Cleveland* v. *Cleveland Electric Illuminating Co.*, 440 F.Supp. 193, 211 (N.D. Ohio 1977), the court followed Judge Weinstein's departure from the traditional rule, explaining that:

> Imputing to an attorney in the private practice all confidential information obtained, or presumed to have been obtained, by other members of his law firm may severely limit the scope of the private attorney's future career and the effective operation of his firm, as well as the individual's right to legal counsel of choice. The . . . rule in the private practice of law should therefore limit the imputation of confidential disclosures, actual or presumed, to only those lawyers practicing in the attorney's area of concentration. Absent direct proof to the contrary, the attorney would not be deemed to have shared confidential information relating to matters and services exclusively within the sphere of representation of another department or section of his firm. This . . . rule is more acutely dramatized in the large, departmentalized law firm characteristically more prevalent in an era of evolving legal specialization.

Kirkland is one of the largest law firms in Chicago, with over 130 partners and associates. Its Washington office adds another 40 members, making it one of the larger firms in the country. The API and Westinghouse assignments were handled by different sets of Kirkland attorneys. They worked at

separate locations, with Chicago attorneys responsible for the Westinghouse litigation and Washington attorneys working on the API report. No reported communications passed between the two offices about the respective work until October 15, 1976, when the Westinghouse complaint first came into the public eye. The API attorneys affirm that they never disclosed any API data to the Westinghouse attorneys either before or after that date. The Chicago attorneys confirm they received none of the data. These affidavits are sufficient to support a conclusion that no disclosure of confidences occurred. *Silver Chrysler, supra,* 518 F.2d at 757. In addition, Clark and Rowe took the additional precaution of returning the data sheets for the API questionnaire to the oil companies. And Stark Ritchie, their supervisor, has received no indications that his instructions on confidentiality have been violated. (Ritchie, ¶ 7). Finally, a large amount of the information compiled for the API was publicly available. In view of this rigid segregation between the Westinghouse and API attorneys, the geographical separation of their offices, and the absence of any hint of actual disclosure, the possibility of improper professional conduct is fairly remote.

We also find that the residue of suspicion which remains from Kirkland's dual engagement does not outweigh the social interests which will be served by their continued representation of Westinghouse in the current litigation. For the past three years, Kirkland has been Westinghouse's lead counsel in the uranium contracts litigation, which is comprised of some 17 lawsuits. Because the potential liability for Westinghouse in these actions extends into the billions of dollars, their outcome is of vital importance to Westinghouse's very corporate existence as well as its shareholders and its customers. Under the guidance and direction of Kirkland, literally hundreds of depositions have been taken. (Pugliese, ¶ 6). The trial of the contracts cases has already consumed six months. One of the major defenses of Westinghouse to these suits involves an alleged antitrust conspiracy between the uranium producers,

which is the subject of the case before us. The connecting lines between the two strands of litigation are multiple and direct; thus, Kirkland's experience in the contracts litigation will be invaluable to the efficient prosecution of the antitrust phase of the dispute.

The ramifications of the Westinghouse litigation are not confined to its own private interests. The allegations of the complaint paint a picture of uranium price-fixing and supply restrictions which spell higher costs for utilities and ultimately higher charges for customers as well. As an example of the national impact of Westinghouse's complaint we take judicial notice of three similar antitrust actions by the Tennessee Valley Authority against many of the same defendants as are named here. In addition, there are a number of other uranium contracts in litigation elsewhere in the country. Our impression of this case, and we think it is objectively verifiable, is that it involves an incredibly complex factual situation which implicates the nationwide and multinational connections of virtually the entire uranium industry. The complaint itself names 29 uranium producers, and consists of some 46 pages of allegations describing a course of conduct spanning some four years and four continents. To force Kirkland to give up the reins to an inexperienced driver at this stage of the journey will cause inevitable delay in the progress of the litigation, and may well compromise the just resolution of a vital public issue. *See W. T. Grant Co.* v. *Haines,* 531 F.2d 671, 677 (2d Cir. 1976).

In sum, when we piece together all the competing arguments on the oil companies' motions to disqualify, we come away with the firm conviction that disqualification of Kirkland is a drastic, unjustified, and inequitable resolution of a minor ethical grievance. Accordingly, the motions of Getty, Gulf and Kerr-McGee to disqualify Kirkland are denied. Because twelve other defendants (Anaconda, Atlas, Denison Canada, Denison U.S., Federal Resources, Homestake, Phelps Dodge, Reserve, Rio Algom U.S., United Nuclear, Utah International and

Western Nuclear) have tied their motions to disqualify to the success of the oil companies', and they raise no substantial ethical charges on their own, their motions are likewise denied.

We now turn to defendant Noranda's motion to disqualify Kirkland. Although Noranda's motion resembles those of the other defendants by charging Kirkland with a conflict of interest in its representation of current and past clients, it contains two distinguishing features. First, there is no doubt that Kirkland had an attorney-client relationship with Noranda from 1965 to 1967. Second, Kirkland's Chicago office has handled both the Noranda and Westinghouse matters, and some of the same attorneys have worked for both clients.

In its motion, Noranda makes the following claims. In the course of its previous representation, Kirkland acquired intimate knowledge of Noranda's corporate organization, officers, marketing methods, business philosophy and its present and future contracts [contacts] with the United States. One avenue of knowledge involved Noranda's relationships with its subsidiaries and associating companies. Two of those companies are Noranda Sales Corporation, Ltd. (Noranda Sales) and Kerr-Addison Mines Limited (Kerr-Addison). Noranda's relationship with these companies has now became a central and essential issue raised by the Westinghouse complaint, whether viewed in terms of jurisdiction, venue, or the merits. Paragraphs 2 and 19 of the complaint attempt to establish jurisdiction and venue over Noranda, a Canadian corporation, through its transaction of business in Illinois "either directly or through its sales agent" Noranda Sales. In addition, paragraphs 19 and 39 of the complaint attempt to connect Noranda to the alleged uranium cartel by alleging that Noranda "holds the controlling interest" in Kerr-Addison, that Kerr-Addison and its wholly-owned subsidiary (Kerramadex) are engaged in uranium exploration and development in the United States, and that Noranda would benefit from those companies' participation in the alleged cartel. Because Kirkland has had access to confidential information on Noranda's intercorporate con-

nections, and that information is highly relevant to proving certain allegations of the Westinghouse complaint, Kirkland must be disqualified to prevent the disclosure of client confidences and the use of those confidences against Noranda in the present action.

In our earlier opinion in *Cannon* v. *U.S. Acoustics Corp.*, 398 F.Supp. 209, 221-224 (N.D.Ill.1975), *aff'd. in relevant part*, 532 F.2d 1118 (7th Cir. 1976), we fully reviewed the legal principles applicable to conflicts of interest between an attorney's current and prior clients. Relying on a consistent line of judicial opinions, we adopted the "substantial relationship" test for judging the nexus between conflicting representations. We noted that the test is a measure of the quantum of evidence required for proof of an ethical violation. 398 F.Supp. at 223. Once this evidentiary standard is satisfied, an inference is created that the attorney has acquired confidential information which he might use, or might be tempted to use, to his present client's advantage or his former client's disadvantage in the present case. To protect and encourage the free flow of information between attorney and client, the attorney in such cases must be disqualified.

Unfortunately, the case law offers no clear guides as to what constitutes a substantial relationship. In most cases in which disqualification has been ordered, the lines between the two lawsuits has been "patently clear" and usually involved the same documents or the same litigation. *Silver Chrysler, supra*, 518 F.2d at 754; *United States* v. *Standard Oil Co.*, 136 F.Supp. 345, 355-56 (S.D.N.Y.1955). In those cases where the connections were not clearly apparent, courts have adopted varying standards. In *United States* v. *Standard Oil Company, supra*, 136 F.Supp. at 356-59, the court focused on the scope and character of the duties of the challenged attorney during his former tenure as a government employee to determine whether he had received knowledge of the subject matter of the current lawsuit. In *Fleischer* v. *A.A.P., Inc.*, 163 F.Supp. 548

(S.D.N.Y.1958), the court employed a complex analysis of the contractual rights of the parties under prior licensing agreements and then asked whether those rights could have any present impact upon the interpretation of the contract which was currently in litigation. Neither of these decisions is particularly helpful here.

Our earlier *Cannon* opinion is more pertinent and instructive. Defendant U.S. Acoustics Corporation (Acoustics) sought to disqualify two attorneys who had rendered legal services for the corporation in the past. In 1970 Giambalvo had drafted a pre-organization subscription agreement for Perlite, a wholly-owned subsidiary of Acoustics. In 1974, his firm represented the plaintiff in filing a derivative stockholder's action against Acoustics. The other attorney, Cannon, was sole legal counsel for Acoustics from 1968 to 1972, and sole legal counsel for Perlite between 1970 and 1973, and had performed a multitude of professional services for all of the defendants during the years 1961-1973. In 1974, he was named a party plaintiff in the derivative action. We denied the motion to disqualify Giambalvo, and granted the motion to disqualify Cannon.

In reaching these divergent outcomes, we noted the differing quantitative and qualitative contacts of each attorney with Acoustics. Giambalvo's relationship with the corporation was "not protracted," lasting only two months. His only reported task involved the drafting of the subscription agreement. Acoustics argued that in connection with this work, Giambalvo received confidential information on internal corporate affairs, including data on finances, taxes, stock and management. And it contended that one paragraph of the agreement authorized a stock issuance which was being challenged in the pending stockholder complaint. In response, Giambalvo asserted that the disputed paragraph was actually drafted and submitted to him by Acoustics' top executive, and that he had never received any data or information regarding Acoustics' internal affairs. His oral communications were limited to the corporate purposes and structure of Perlite, the Acoustics subsidiary.

Cannon's activities on behalf of Acoustics were much more pervasive. He performed a multitude of legal services for Acoustics over a 12-year period. We gave strong weight to the fact that this time period encompassed the time span in which the wrongs described in the pending complaint allegedly occurred. We noted that Cannon as corporate attorney prepared many agreements which Cannon as plaintiff then sought to rescind. He had personal conferences with corporate executives, gave legal opinions, and reviewed all material mailed to shareholders. We concluded "that Cannon must have had access to information and materials which could be used adversely against his former clients." 398 F.Supp. at 227.

From a comparison of these two attorneys who shifted from corporate counsel to corporate adversary, we discern that disqualification is more likely if the attorney has a regular and protracted association with the corporation, is currently challenging corporate actions in which he was a participant, and received confidential information about internal corporate affairs which bear on the present controversy.

When we examine the record in the present case, we find a situation falling somewhere in between Giambalvo and Cannon. Kirkland's representation of Noranda ranged from July, 1965 until August, 1967 (Cork, ¶ 4). In 1965, Kirkland represented Noranda in the formation of a joint venture with Central Farmers Fertilizer Company (CFF), a domestic corporation centered in Chicago, Illinois. By that agreement, Noranda and CFF formed a Canadian corporation to mine potash in Canada. (Cork, ¶ 14; Johnson, ¶ 4). Noranda points to only one connection between the CFF deal and the Westinghouse complaint. Mr. D. E. G. Schmitt is an executive of both CFF and Noranda. In pretrial discovery on jurisdiction and venue issues, Mr. Schmitt has been scheduled for a deposition by Westinghouse. Of all the defendants, only Noranda was targeted for depositions of more than one person, namely Mr. Schmitt. Noranda concludes that Kirkland took advantage of

information gleaned from its prior representation to discern the importance of Schmitt's deposition. In our view, Noranda's chain of logic is tenuous, to say the least. Even Noranda admits that Kirkland has alternate public sources of information for Schmitt's identity. Given the wholly different character of a potash joint venture and a uranium price-fixing conspiracy, the CFF matters contribute virtually nothing to the presence of a substantial relationship.

The more serious allegations center around Noranda's abortive effort in 1967 to acquire control of Essex Wire Corporation, a U.S. corporation, by means of a negotiated exchange offer. Working in conjunction with Noranda's general counsel in Toronto, Canada, Kirkland advised Noranda on the impact of U.S. anti-trust, corporation, securities and tax laws on the proposed exchange offer. (Cork, ¶¶ 6-8; Johnson, ¶¶ 4-5). The mechanics of the exchange required the formation of a Delaware subsidiary (Noranda, Inc.) of the Canadian corporation (Noranda Mines Ltd.). (Cork, ¶ 16; Johnson, ¶ 5). The actual exchange then involved the offering of a package of securities and cash by the Noranda subsidiary to Essex shareholders, in return for Essex stock. (Cork, ¶ 8; Johnson, ¶ 5). Kirkland carried out the ministerial work of organizing the American subsidiary, which included the naming of three Kirkland attorneys as incorporators, the holding of the first meeting, and the election of directors. (Cork, ¶ 16; Johnson, ¶ 6). Kirkland's actual degree of participation in the decision to utilize an American subsidiary is somewhat unclear. Noranda's Vice-President confirms the conclusory assertion that Kirkland advised the company on the "preferred corporate structures" for the transaction. (Cork, ¶ 8). The Kirkland attorney who worked on the matter recalls that the decision was made by Noranda and its general counsel at the outset, and that Kirkland proffered no advice on the business or legal advantages of that decision. (Johnson, ¶ 6).

In addition to establishing the American subsidiary and constructing the securities package, Kirkland advised Noranda

of the disclosures required under the securities laws, the tax consequences of the exchange, and the antitrust problems. According to Kirkland, the antitrust issues were substantial since both Noranda and Essex sold copper wire and cable in the U.S. and Noranda was to become the supplier of Essex's considerable copper requirements. (Johnson, ¶ 5; Bartlit, ¶ 4). Three Kirkland attorneys studied the antitrust issues, which culminated in the preparation of a "Fact Book" which analyzed the competitive impact of the acquisition. (Bartlit, ¶¶ 4-6; Cork, ¶ 7).

Because both the Noranda and Westinghouse representations involve antitrust questions, the scope of Kirkland's antitrust inquiry for Noranda is critical to determining whether a substantial relationship exists. Noranda quotes from a Kirkland memorandum which called for:

> "A rather comprehensive examination of the records and file of Noranda (and Canadian Wire and Cable), including directors' and executive committee meeting minutes, long range planning studies and reports, and all communications among key personnel. This search should undoubtedly extend beyond any references to the immediate transaction and cover as well the entire area of efforts or plans to invest or operate in the United States." (Cork, ¶ 7).

Noranda states that in fulfilling this task, Kirkland gained access to detailed information concerning its corporate organization, its officers, sales contracts, marketing methods, business philosophy, customer lists, sales data, business contacts with the United States, its relationships with Noranda Sales and Kerr-Addison, and its future plans for U.S. activities. (Cork, ¶¶ 5, 8-10). Based on these facts, Noranda concludes that Kirkland inquired into "all aspects of Noranda's business activities."

In response to this charge of corporate omniscience, Kirkland's attorney states that the antitrust investigation was limited

to copper and copper products "because those were the only areas of actual or potential competition between Essex and Noranda." He recalls no reference to uranium and can find no indication in his present files that the investigation probed Noranda's amenability to the jurisdiction of U.S. courts. (Bartlit, ¶¶ 7-9). Kirkland justifiably pleads ignorance as to the exact scope of its investigation, since the fact book and " all of the items of material personal to Noranda" were returned to the corporation on August 1, 1967 after the tender offer was aborted. (Noranda Exh. A). In addition, Kirkland simultaneously destroyed the longhand notes of its attorneys who viewed corporate data. *(Id.)* Kirkland's files are devoid of the antitrust documents, and Noranda has refused to allow Kirkland to inspect the fact book in its possession. (Bartlit, ¶ 8; Edelman, ¶¶ 2-3).

The final facts to be figured into the substantial relationship test cover Kirkland's activities from 1967 to the present. The firm has not represented Noranda on any matter since 1967. On October 15, 1976 Kirkland filed a complaint on behalf of Westinghouse against Noranda and 28 other corporations, alleging conspiratorial conduct in the pricing and marketing of uranium. Noranda's connection with uranium is based on the sales activities of Noranda Sales and the uranium business of Kerr-Addison. The complaint alleges a uranium price-fixing conspiracy which did not begin until 1972, five years after the Noranda representation ended.

Based on this factual situation, we see no substantial relationship between the Noranda and Westinghouse representations. The subject matter and temporal span of the two engagements are wholly different. The Essex Wire Corporation has no place in the present litigation. In the prototypical case for disqualification, Kirkland's present representation would involve an antitrust suit against Noranda and others for monopolization of the copper industry. Instead the Westinghouse complaint concerns a completely different industry

and a completely different time. Failing the subject matter relatedness test, Noranda falls back on the argument that Kirkland may have acquired internal corporate information which is relevant to the issues in the Westinghouse complaint. Noranda emphasizes the all-inclusive scope of the antitrust inquiry conducted by Kirkland in the Essex matter, and concludes that the data gleaned during the inquiry is directly applicable to current issues.

Thus the only real question is whether Kirkland's prior antitrust investigation for Noranda makes it reasonable to say that Kirkland might have acquired information related to the issues raised in the Westinghouse lawsuit. The question is not an easy one, but we conclude that the connecting lines are too thin to warrant disqualification. We believe it is speculative and wholly unrealistic for Noranda to charge Kirkland with omniscience about its corporate organization based upon a 10-year old working relationship, and then carry that imputation of knowledge to a wholly unrelated representation. Several factors contribute to this conclusion. Kirkland did not have a protracted or regular association with Noranda. It was not the corporation's general counsel. Its Essex representation was specialized and focused. Unlike the disqualified attorney in *Cannon,* Kirkland had no continuing symbiotic relationship with the corporation. It was employed for a specific purpose and then dropped. It is possible that some of the data perused in 1967 might shed a pale light on Noranda's connection with its associated companies. But the information was examined in the context of market concentration in the copper industry, not market conspiracy in the uranium industry. And the data on Noranda's sales and business contacts with the United States is likely to be obsolete in 1976 or even in 1972, when the conspiracy allegedly began. No one in the firm has a present recollection of Noranda's intercorporate connections, and a draftsman of the Westinghouse complaint states that all information used in preparing the complaint was taken from public sources. (Goold, ¶¶ 2-3; Bartlit, ¶ 8; Johnson, ¶ 6). All

pertinent data collected during the antitrust inquiry was either returned to Noranda or destroyed. The contemporaneous documents evidencing those actions convincingly demonstrate that Kirkland's involvement was abruptly and thoroughly terminated when its limited task was completed. In sum, we are left with the bold speculation that some unspecified residue or fallout from a long-closed file continues to haunt the hallways of Kirkland's offices. Such a speculative connection goes far beyond any of the connections in reported cases in which disqualification of an attorney was ordered. We agree with the sentiments of the court on *Bonus Oil Co.* v. *American Petrofine Co.,* 1975 Trade Cas. ¶ 60,315 (D.Neb. 1975):

> "Where the issues dealt with in a prior representation are substantially related to issues raised in the representation in question, the court need not and should not require proof of actual exposure to relevant client confidences; but in cases like this where the issues are not so related, the party seeking disqualification must show that there was actual exposure to material which a reasonable man would say could be relevant to the present litigation."

Since Noranda has not satisfied this burden, its motion to disqualify Kirkland is denied.

The final motion to disqualify pending before us raises issues similar to those in the Noranda motion, but in a completely different context. The motion, which is presented by defendant Gulf Oil Corporation, is not directed at removing counsel for plaintiff, its natural adversary. Rather it seeks to eliminate counsel for one of Gulf's co-defendants, United Nuclear. The challenged firm is Bigbee, Stephenson, Carpenter & Crout ("Bigbee"). From 1971 until 1976, Bigbee provided legal services to Gulf in connection with its uranium properties in New Mexico.

Gulf charges that on behalf of United Nuclear, Bigbee has taken a position adverse to Gulf in the present action. In addition, Gulf claims that Bigbee's prior work for Gulf allowed it to acquire confidential information that has a substantial bearing on the present litigation and may even require Gulf to call Bigbee attorneys as witnesses against United Nuclear. Bigbee has defended the Gulf attack on all fronts, contending that there is no adversity between the two co-defendants, and no substantial relationship between its prior Gulf work and the Westinghouse action. Furthermore, Bigbee counterattacks with the claim that Gulf has repeatedly consented to its representation of United Nuclear, even against Gulf. We find that although the present interests of Gulf and United Nuclear can be considered adverse for present purposes, there is no substantial relationship between Bigbee's two engagements. With that fundamental prerequisite to disqualification lacking, it is unnecessary to resolve the issue of consent.

Gulf asserts that the presence of antagonistic interests is apparent from United Nuclear's answer to the Westinghouse complaint. Paragraph 4 of the complaint contains general introductory statements describing Westinghouse's corporate identity and the scope of its business. It concludes with the statement that Westinghouse has bought and sold uranium "until and after the commencement of the illegal acts complained of herein." Westinghouse later describes those illegal acts in the twenty pages of its complaint between paragraphs 35 and 54. In its answer to paragraph 4, United Nuclear admits the allegations describing Westinghouse, but denies any participation in the illegal acts described in the last sentence of the paragraph. United Nuclear then goes on to admit that it has obtained information which discloses that Gulf has "engaged in certain activities designed to unlawfully affect uranium market conditions, which activities may be contemplated by the allegations of 'illegal acts' . . ." in paragraph 4. We agree with Gulf that the alignment of the parties is not the exclusive criterion for

judging adverse interests, and that United Nuclear's answer creates adversity by pointing an accusatory finger at Gulf while exonerating itself.

Gulf also has the burden of showing that Bigbee's prior representation of Gulf is substantially related to its adverse representation of United Nuclear in the present litigation, so that there is a reasonable possibility of the transmission of relevant confidential information. Gulf's chain of logic is as follows. From 1971 until 1976, Bigbee represented Gulf in the development of uranium reserves at its Mt. Taylor Project in New Mexico. Of Gulf's proven domestic uranium reserves, its Mt. Taylor properties are the "most significant." As of March, 1977, Gulf has not mined or milled uranium from this area. Gulf purchased some of the property from, or holds joint interests in the property with, a corporation named Kerramadex. In representing Gulf, Bigbee became privy to Gulf's reasons for the delayed production of uranium at Mt. Taylor, and to Gulf's relationship with Kerramadex. In its present complaint against Gulf, Westinghouse has alleged that Gulf has conspired with other defendants to curtail the supply of uranium, and has alleged that one of Gulf's co-conspirators (Noranda) has acted through Kerramadex. Given the overlap on these two issues, and Bigbee's prior representation of Gulf "in its capacity as a uranium supplier," a substantial relationship exists.

Gulf's logic is superficially tantalizing, but a close examination of the facts reveals that Gulf has strained very hard to arrive at a miniscule overlap of two large and complex legal canvases. We are not going to lengthen an already tiresome opinion by staking out the broad outlines of these two undertakings. Where the scope of litigation reaches gargantuan dimensions in terms of time and complexity, two trends emerge. The theoretical opportunities for the use of information in multiple settings increases. And the lawyer's ability to define the exact nature of his legal services is correspondingly reduced.

These consequences create tactical advantages for the party presenting a motion to disqualify, and serious handicaps for the attorney opposing it. In addition, as the breadth of the representations increases, the court finds that the substantial relationship test becomes more and more unmanageable. The court must attempt a second-hand reconstruction of the earlier representation, through masses of cryptic billing statements, competing versions of stale conversations, and a myriad of legal documents.

We have reviewed all the documents submitted by Gulf and United Nuclear, and conclude that the asserted connections between the two representations by the Bigbee firm fall on the outer periphery of both cases, where the possibility of overlapping disclosures is insufficient to warrant disqualification. The Bigbee work for Gulf during 1971 through 1976 centered on perfecting title and handling mining claims to Gulf's property holdings at Mt. Taylor, as well as advancing Gulf's interests on water quality, environmental impact, tax and energy resource matters in the New Mexico state legislature. Bigbee has never represented Gulf in purchases or sales of uranium, or in antitrust matters. While Bigbee certainly did gain knowledge of Gulf's uranium properties during its work, its efforts were focused on real estate transactions connected with Gulf's untapped and undeveloped uranium reserves. The Westinghouse complaint contains a few scanty references to the alleged conspiratorial control of uranium production (Cf. ¶¶ 36, 39(b) and 46), but the heart of the complaint is directed at alleged price-fixing arrangements, fixing of contract terms, and withdrawal from the market of uranium supplies. The evidence pertinent to those allegations will focus on meetings and communications among the alleged co-conspirators, as well as evidence on uranium prices, terms and conditions of sale, and market availability. When the two Bigbee representations are viewed in their totality, Gulf's assertions that Bigbee a) has been aware of reasons for Gulf's delayed uranium production at Mt. Taylor and b) may have acquired some knowledge of

at Mt. Taylor and b) may have acquired some knowledge of Gulf's relationship with one of the joint owners of the property in the course of its title searches and real estate transactions, do not create persuasive connecting links to the Westinghouse action. In our view, Gulf's argument is equivalent to saying that apples and oranges are substantially related because both contain Vitamin C.[2]

Gulf has raised another ground for disqualification which presumes a substantial relationship between the two Bigbee engagements. It argues that Bigbee's intimate knowledge of the Mt. Taylor project and Gulf's relationship with Kerramadex may require Bigbee attorneys to testify in Gulf's defense to Westinghouse's charges of uranium curtailment and conspiracy, all to the detriment of its present client, United Nuclear. Because we have found no substantial relationship between the two representations, however, we see no reasonable possibility that Bigbee attorneys will have relevant testimony to offer here. Even if their testimony were relevant, it would probably be unnecessary, since other witnesses would have more direct knowledge of the Mt. Taylor properties.

Accordingly, Gulf's motion to disqualify the Bigbee firm is denied.

For the foregoing reasons an order will be entered denying all of the pending motions to disqualify counsel.

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[2] Gulf points to a statement in United Nuclear's answer to infer that Bigbee has in fact obtained confidential information related to the Westinghouse suit. In the answer, United Nuclear admits that it has obtained information about illegal Gulf activities designed to affect uranium market conditions "in the course of proceedings and discovery in other pending litigation, and elsewhere." A Bigbee attorney flatly denies that "elsewhere" refers to the firm's prior representation of Gulf. (Crout, ¶ 28). The "other pending litigation" refers to actions by United Nuclear against Gulf and other companies arising out of agreements by United Nuclear to supply uranium concentrates to a partnership of which Gulf was a member. In these actions, United Nuclear has charged Gulf with antitrust violations under New Mexico law. Bigbee has only represented United Nuclear in these lawsuits. (Bigbee, ¶¶ 10, 11, 15).

United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Hon. PRENTICE H. MARSHALL

Cause No. 76 C 3830

April 25, 1978

WESTINGHOUSE ELECTRIC CORPORATION

v.

RIO ALGOM LIMITED, *et al.*,

ORDER

For the reasons stated in the Memorandum Decision of April 18, 1978, the motions of defendants Kerr-McGee, Getty, Gulf, Anaconda, Atlas, Denison Canada, Denison U.S., Federal Resources, Homestake, Phelps Dodge, Reserve, Rio Algom U.S., United Nuclear, Utah International, Western Nuclear and Noranda Mines Limited to disqualify the law firm of Kirkland & Ellis from representing plaintiff Westinghouse Electric Corporation are denied. The motion of Gulf to disqualify the law firm of Bigbee, Stephenson, Carpenter & Crout from representing co-defendant United Nuclear is denied.

PRENTICE H. MARSHALL

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 78-1544, 78-1545, 78-1546 and 78-1547

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff-Appellee,

v.

KERR-MCGEE CORPORATION, NORANDA MINES LIMITED, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, and GETTY OIL COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-3830

Prentice H. Marshall,
Judge.

ARGUED JUNE 12, 1978—DECIDED JULY 25, 1978

Before FAIRCHILD, *Chief Judge,* SPRECHER and BAUER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The novel issues on this appeal are (1) whether an attorney-client relationship arises only when both parties consent to its formation or can it also occur when the lay party submits confidential information to the law party with reasonable belief that the latter is acting as the former's attorney and (2) whether the size and geographical scope of a law firm exempt it from the ordinary ethical considerations applicable to lawyers generally.

The four separate appellants are some of the defendants in this antitrust case who were each denied their motions to disqualify the law firm of Kirkland and Ellis ("Kirkland") from further representing the plaintiff, Westinghouse Electric Corporation ("Westinghouse"). Whether fortuitously or by design, on the same day, October 15, 1976, Kirkland, while representing the American Petroleum Institute ("API"), of which three of the appellants, Gulf Oil Corporation ("Gulf"),[1] Kerr-McGee Corporation ("Kerr-McGee") and Getty Oil Company ("Getty"), were members, released a report which took an affirmative position on the subject of competition in the uranium industry, while simultaneously filing this lawsuit, representing Westinghouse, seeking to establish an illegal conspiracy in restraint of trade in the uranium industry.

The fourth appellant, Noranda Mines Limited ("Noranda"), asserts a different conflict of interest in Kirkland resulting from its prior representation of Noranda from 1965 to 1967 in several matters.

The complaint in this case was filed on October 15, 1976 and the four appellants moved to disqualify Kirkland in January and February 1977. On April 18, 1978, the district court filed a lengthy memorandum followed by orders denying the disqualification motions. *Westinghouse Electric Corp.* v. *Rio Algum* [*Algom*] *Limited,* 448 F. Supp. 1284 (N.D. Ill. 1978). These appeals followed. This court has jurisdiction under *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). *Schloetter* v. *Railoc of Indiana, Inc.,* 546 F.2d 706, 709 (7th Cir. 1976).

I.

On September 8, 1975, Westinghouse, a major manufacturer of nuclear reactors, notified utility companies that 17 of its

[1] Gulf Minerals Canada Limited is also a defendant but for convenience hereafter is included with Gulf Oil Corporation as "Gulf."

long-term uranium supply contracts had become "commercially impracticable" under § 2-615 of the Uniform Commercial Code. In response, the affected utilities filed 13 federal actions, one state action, and three foreign actions against Westinghouse, alleging breach of contract and challenging Westinghouse's invocation of § 2-615. The federal actions were consolidated for trial in the Eastern District of Virginia at Richmond under MDL Docket No. 235.

As an outgrowth of its defense of these contract actions, Westinghouse on October 15, 1976, filed the present antitrust action against 12 foreign and 17 domestic corporations engaged in various aspects of the uranium industry.

Kirkland's representation of Westinghouse's uranium litigation has required the efforts of 8 to 14 of its attorneys and has generated some $2.5 million in legal fees.

Contemporaneously with its Westinghouse representation in the uranium cases, Kirkland represented API, using six of its lawyers in that project.

In October, 1975, Congress was presented with legislative proposals to break up the oil companies, both vertically by separating their control over production, transportation, refining and marketing entities, and horizontally by prohibiting cross-ownership of alternative energy resources in addition to oil and gas. Since this proposed legislation threatened oil companies with a potential divestiture of millions of dollars of assets, in November, 1975, the API launched a Committee on Industrial Organization to lobby against the proposals. On December 10, 1975, API's president requested that each company designate one of its senior executives to facilitate coordination of the Committee's activities with the individual companies.

The Committee was organized into five task forces. The Legal Task Force was headed by L. Bates Lea, General Counsel of Standard Oil of Indiana, assisted by Stark Ritchie, API's General Counsel.

On February 25, 1976, Ritchie wrote to Frederick M. Rowe, a partner in Kirkland's Washington office, retaining the firm to review the divestiture hearings and "prepare arguments for use in opposition to this type of legislation." On May 4, 1976, Ritchie added that the Kirkland firm's work for API "should include the preparation of possible testimony, analyzing the probable legal consequences and antitrust considerations of the proposed legislation" and "you should make an objective survey and study of the probable effects of the pending legislation, specifically including probable effects on oil companies that would have to divest assets." Ritchie noted that "[a]s a part of this study, we will arrange for interviews by your firm with a cross-section of industry personnel." The May 4 letter to Rowe concluded with:

> Your firm will, of course, act as an independent expert counsel and hold any company information learned through these interviews in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data.

On May 25, 1976, Ritchie sent to 59 API member companies a survey questionnaire seeking data to be used by Kirkland in connection with its engagement by API. In the introductory memorandum to the questionnaire, Ritchie advised the 59 companies that Kirkland had "ascertained that certain types of data pertinent to the pending anti-diversification legislation are not now publicly available" and the API "would appreciate your help in providing this information to Kirkland. . . ." The memorandum included the following:

> Kirkland, Ellis & Rowe is acting as an independent special counsel for API, and will hold any company information in strict confidence, *not to be disclosed to any other company, or even to API,* except in aggregated or such other form as will preclude identifying the source company with its data.

(Emphasis in original). The data sought was to assist Kirkland "in preparing positions, arguments and testimony in opposition to this type of legislative [divestiture]" and was not to be sent to API but rather to Kirkland.

Pursuant to the provision in Ritchie's May 4, 1976 letter to Rowe that interviews would be arranged with a cross-section of industry personnel, Nolan Clark, a Kirkland partner, interviewed representatives of eight oil companies between April 29 and June 15, 1976.

After going through several drafts, the final Kirkland report to API was released on October 15, 1976. The final report contains 230 pages of text and 82 pages of exhibits. References to uranium appear throughout the report and uranium is the primary subject of about 25 pages of text and 11 pages of exhibits. The report marshalls a large number of facts and arguments to show that oil company diversification does not threaten overall energy competition. In particular the report asserts that the relatively high concentration ratios in the uranium industry can be expected to decline, that currrent increases in uranium prices are a result of increasing demand, that oil company entry into uranium production has stimulated competition and diminished concentration, that oil companies have no incentive to act in concert to restrict coal or uranium production and that the historical record refutes any charge that oil companies have restricted uranium output. The report concludes that "the energy industries, both individually and collectively, are competitive today and are likely to remain so." 448 F. Supp. at 1296.

As noted at the outset of this opinion, the API report was issued on the same day as the present antitrust suit was filed against several defendants, including Gulf, Kerr-McGee and Getty.

The district court concluded that "[a] comparison of the two documents reveals a rather basic conflict in their contentions and underlying theories." 448 F. Supp. at 1295. The court also observed that "[p]erhaps in recognition of the diametrically opposing theories of the API report and the Westinghouse complaint, Kirkland does not attempt to rebut the oil companies' charges that it has simultaneously taken inconsistent positions on competition in the uranium industry." 448 F. Supp. at 1296.

Gulf, Kerr-McGee and Getty are substantial dues paying members of API. Kerr-McGee and Getty are also represented on API's board of directors.

At Ritchie's request, the cross-section interviews were mainly arranged by Gerald Thurmond, Washington Counsel of Gulf Oil Company and a member of API's Antitrust Strategy Group. On May 11, 1976, Thurmond advised Gulf officials that Nolan Clark of Kirkland planned to visit them. Attached to Thurmond's letter were the questions "which will be covered" in the meeting.[2]

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[2] The questions were prepared by Nolan Clark as "the kinds of questions I might want to ask":

In which alternative energy businesses is your company engaged? How, when, and why did your company enter these businesses?

What assets would your company have to divest in order to get out of alternate energy businesses?

Of the affected assets, could some be divested in the form of independent operating entities? Which? Could other affected assets be sold to other presently existing entities? Which? Are you in some alternate energy businesses which could not be sold, but rather would have to be liquidated? If so, what would your estimate losses be?

Would your divestiture of alternative energy businesses violate any contractual provisions of your loan or debenture agreements? Other contractual arrangements? If so, which? Would you anticipate any serious problems in

(Footnote continued on following page)

The meeting was held on May 28, 1976 in Denver. Nolan Clark represented Kirkland. In attendance for Gulf were six vice presidents, a comptroller and a regional attorney. Also present was a Harvard professor who "also is working with API on the same subject." The meeting lasted more than two hours followed by lunch, during which discussions continued. After the meeting and in three letters from Gulf vice president Mingee to Clark dated August 10, 11 and 13, Gulf submitted specific information sought by Clark through the questionnaire and other written questions and in each letter Mingee stressed the confidential basis upon which the information was supplied.

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[2] *Continued*

renegotiating contractual provisions? If so, what kind of problems?

Would you anticipate any problems of disposing of alternative energy assets? If so, what kind of problems? Are your leaseholds assignable? Would you have to sever coal & uranium minerals rights from other mineral rights? Would this cause any significant problems?

Would you anticipate any problem in receiving a fair market price for assets to be divested? If so, what kind of problems and why?

The statement has been made that oil and gas companies can easily divest alternate energy businesses by "spinning off" companies with those assets. Is this statement accurate?

What specific problems do you foresee arising by the possible passage of horizontal divestiture legislation? short-term? long-term?

Who if anyone would you expect to be affected adversely by horizontal divestiture? How and why?

How do the problems of divestiture compare under the following scenarios: (1) the company has a given number of years to get out of alternate energy businesses subject to criminal sanctions, and (2) the company would be required to get out of alternate energy businesses in accordance with judgments entered in civil actions to be brought by Attorney General?

What effect do you think passage of a horizontal divestiture bill would have on your long and short term investment plans?

(Footnote continued on following page)

Nolan Clark's interview with two Kerr-McGee vice presidents took place in Oklahoma City on June 9, 1976 and lasted about three hours. Clark was given considerable background information on Kerr-McGee's uranium industry, including mining locations, uranium conversion process, and pellet fabrication. On the subject of uranium marketing and pricing, one of the Kerr-McGee vice presidents described the escalating prices and tightening supplies in the current market, and the reasons behind the trends. Kerr-McGee sent its completed questionnaire to Clark on August 25, 1976.

[2] *Continued*

Do you expect that passage of horizontal divestiture legislation would affect your ability to raise capital?

Are your non-oil and gas energy assets managed separately from oil and gas assets? What overlaps are there between them?

Have you found that your oil and gas expertise and resources have been of any particular value as you have developed alternate energy sources? If yes, how?

Do petroleum companies have specific assets that are uniquely valuable to alternative energy sources?

Do you expect the same rate of return for oil drilling. coal production, uranium exploration?

If an oil company owns alternative fuel possibilities, would you reasonably expect a coal division of that company to try to undersell the oil division on a BTU equivalent basis, or nuclear division to do the same thing?

Do you attempt to sell oil, natural gas, coal and uranium at BTU equivalent prices? If so, why? If not, why not? Over the long run do you expect alternative energy sources to have BTU equivalent prices? Are long-run investments made, based upon this expectation?

Will oil companies with substantial interests in oil production be reluctant to develop low cost alternative sources of energy, *e.g.*, oil shale?

Are you presently developing coal reserves, uranium reserves? At what rate? If you do not presently plan to develop certain reserves within the near future, why not?

(Footnote continued on following page)

Kirkland did not interview any Getty personnel. However, Getty received the confidential API questionnaire which requested it to estimate the value of its assets subject to proposed divestiture and its research and development outlays in alternative energy fields. Getty completed the questionnaire and

[2] *Continued*

Do you know of any oil or gas companies that have lower cost alternate sources of energy that they are not developing? Under what economic conditions do you think it would make sense for an oil or gas company to acquire and not develop alternate energy sources?

With respect to coal as a synthetic fuel source, is there any fundamental economic reason why a completely new synthetic fuel industry should not develop, separate from conventional fuel industries?

When do you expect commercially feasible coal liquifaction [liquefaction]? Coal gasification? Production of oil from oil shale? From tar sands? What magnitude of capital investments do you anticipate will be required in these various areas to reach the stage of commercial development?

Have the oil companies blocked coal liquefaction research?

If coal becomes a major source of methane-based pipeline gas, what would be the consequences on the coal market if integrated petroleum companies are both buyers and sellers of gas and coal?

Where are the benefits from the entry of oil companies into coal?

Have oil companies increased their holdings of coal reserves faster than they have increased coal production? Are the oil companies cementing their control over future, not current, production through coal reserve ownership?

Do oil companies control the most producible and most economical coal reserves?

Is the oil industry aiding coal production?

Is entry into the coal industry difficult because of the shortage of skilled miners and skilled mine managers?

How easy or difficult is entry into the uranium mining and uranium milling businesses?

(Footnote continued on following page)

mailed its data sheets to Nolan Clark on June 4, 1976, with the understanding that the data would be held in confidence.[3]

II.

The crux of the district court's determination was based upon its view that an "attorney-client relationship is one of agency to which the general rules of agency apply" and "arises *only* when the parties have given their consent, either express or

[2] *Continued*

Is the uranium industry competitive? Is that industry becoming more or less competitive? What evidence could you give to support your answer?

What are the benefits from the entry of oil companies into uranium mining? Into uranium milling?

Are the oil companies aiding uranium production?

Do oil companies control the most producible and most economical uranium reserves?

Have oil companies increased their holdings of uranium reserves faster than they have increased uranium production?

[3] Nolan Clark had "come to the conclusion that certain information was not then available from publicly available sources" so the following questions were sent to 59 companies, including Gulf, Kerr-McGee and Getty:

I. If it became law, would S.489 apply to your company?

II. If S.489 were to become law, what would be your best good faith estimate of the $$ value of the assets that you would have to divest, in the:

(a) coal business
(b) oil shale business
(c) (1) production, mining & milling of uranium
(2) nuclear fuel cycle
(d) nuclear reactor business
(e) geothermal steam business
(f) solar energy business
(g) other

(Footnote continued on following page)

implied, to its formation." 448 F. Supp. at 1300 (emphasis supplied). Although some courts have stated that the attorney-client relation is one of agency and that the general rules of law applicable to agencies apply,[4] in none of those cases was an

[3] *Continued*

III. Approximately how much has your company spent in the last year, the last five years, and the last ten years for research and development in connection with:

(a) mining of coal
(b) gasification of coal
(c) liquefaction of coal
(d) development of oil shale
(e) development of tar sands
(f) (1) exploration, mining & milling of uranium
(2) nuclear fuel cycle
(g) nuclear reactors
(h) exploration, mining, or production of geothermal steam
(i) solar energy

IV. What are your company's last good faith estimates of planned or projected research and development outlays for the next five years, and for the next ten years, in connection with:

(a) mining of coal
(b) gasification of coal
(c) liquefaction of coal
(d) development of oil shale
(e) development of tar sands
(f) (1) exploration, mining & milling of uranium
(2) nuclear fuel cycle
(g) nuclear reactors
(h) exploration, mining, or production of geothermal steam
(i) solar energy.

[4] *Rothman* v. *Wilson,* 121 F.2d 1000, 1006 (9th Cir. 1941); *Hensley* v. *United States,* 281 F.2d 605, 607 (D.C. Cir. 1960); *Brinkley* v. *Farmers Elevator Mut. Ins. Co.,* 485 F.2d 1283, 1286 (10th Cir. 1973).

agency principle applied to assist an attorney to avoid what would otherwise be an obligation to his client.[5]. Only one court seems to have added that an attorney-client relationship arises *only* when the parties have expressly or impliedly consented to its formation. *Committee on Professional Ethics and Grievances* v. *Johnson,* 447 F.2d 169, 174 (3d Cir. 1971). In that case, the court reversed and remanded a disbarment case on the ground of lack of adequate notice of the charges and declined to pass upon the merits. 447 F.2d at 174, n.8.

Of course in many respects and situations an attorney acts as a simple agent for the client, but the attorney is held to obligations to the client which go far beyond those of an agent and beyond the principles of agency, just as they transcend the legal bounds of an arms length commercial transaction. Mr. Chief Justice (then Judge) Burger said in *Udall* v. *Littell,* 366 F.2d 668, 675, 676 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1007 (1967):

> [A]n attorney engaged in controversy with a client in relation to a contract for professional services is in some respects in a different posture from an ordinary litigant involved in an arms length commercial transaction; as an attorney he is bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client.
>
> * * * *
>
> The basic elements of the attorney-client relationship are not changed because the contract for services is expressed in a formal written contract. Indeed the very making of a formal contract and its performance impose a high duty on the attorney because he is dealing in an area

[5] In *Rothman,* the court of appeals affirmed a judgment in favor of clients against an attorney for fraud in obtaining secret profits in business transactions; in *Hensley,* the court held that an attorney can waive a jury trial on behalf of his client as a tactical decision; in *Brinkley,* the court held that a client was not liable under the doctrine of *respondeat superior* for the tortious conduct of his attorney which caused injury to a third party.

> in which he is expert and the client is not and as to which the client must necessarily rely on the attorney. . . . This is not to suggest that a formal contract is unimportant but rather that a formal long-term contract, superimposed on the normal attorney-client relationship, alters the relationship only by adding new dimensions of duties and obligations on the attorney.

For these reasons it is obvious why an attorney-client relationship does not arise only in the agency manner such as when the parties expressly or impliedly consent to its formation as the district court erroneously concluded.

The district court first determined that there existed no explicit or express attorney-client relationship in that no oil company representative requested Kirkland to act as its attorney orally or in writing and Kirkland did not accept such employment orally or in writing. The district court found that "Kirkland sent its legal bills to the API, and was compensated only by the API." 448 F. Supp. at 1301. A professional relationship is not dependent upon the payment of fees[6] nor, as we have noted, upon the execution of a formal contract.[7]

[6] *Allman* v. *Winkelman,* 106 F.2d 663, 665 (9th Cir. 1939), *cert. denied,* 309 U.S. 668 (1940) ("lawyer's advice to his client establishes a professional relationship though it be gratis"); *Fort Meyers Seafood Packers, Inc.* v. *Steptoe and Johnson,* 381 F.2d 261, 262 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 946 (1968) (attorney's fees paid by third party: "If appellant is not obligated to pay appellees for their services, it does not follow that there was no attorney-and-client relation"); *Dresden* v. *Willock,* 518 F.2d 281, 286 (3d Cir. 1975)("The fact that Dresden was to be paid by receiving stock in the enterprise did not change the nature of the [attorney-client] relationship"); *E.F. Hutton & Co.* v. *Brown,* 305 F. Supp. 371, 388 (S.D. Tex. 1969) (Relation of attorney and client "is not dependent on the payment of a fee").

[7] *Udall* v. *Littell,* 366 F.2d 668, 676 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1007 (1967); *E.F. Hutton & Co.* v. *Brown, supra* note 6, at 388.

The court then purported to determine whether the professional relationship "may be implied from the conduct of the parties." First, it found no "indicia" such as "the preparation of a legally-binding document like a contract or a will, or the attorney's appearance in a judicial or quasi-judicial proceeding." 448 F. Supp. at 1301. Second, the court searched for evidence of three fundamental characteristics of an agency relationship: the power to affect the legal relations of the principal and others; a fiduciary who works on behalf of his principal and primarily for his benefit; and a principal who has the right to control the conduct of the agent. 448 F. Supp. at 1301-03. Using these tests, the court concluded that "[v]iewed in its totality, we believe that the evidence shows that no attorney-client relationship has existed between Kirkland and the oil companies." As we have indicated, to apply only the agency tests is too narrow an approach for determining whether a lawyer's fiduciary obligation has arisen.

The district court also erroneously permitted itself to be influenced by the size of the law firm involved. In addition to identifying Kirkland as one of the largest law firms in Chicago with a two-city operation including 130 lawyers in the Chicago office and 40 lawyers in the Washington, D.C. office, the court observed that "[w]ith the modern-day proliferation of large law firms representing multi-billion dollar corporations in all segments of the economy and the governmental process, it is becoming increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests." 448 F. Supp. at 1287-88.

Although the court recognized that "where courts have found a disclosure of client information to one member of a law firm, such knowledge has traditionally been imputed to all members of his firm," it opted in this case to reject "this rigid approach, in recognition of the changing realities of modern legal practice." 448 F. Supp. at 1304.

The district court abused its discretion in applying a narrow, formal agency approach to determining the attorney-client relation and in applying a different imputation of knowledge principle in the case of a large law firm than that "traditionally" and recently applied by this circuit to sole practitioners and smaller firms. *Schloetter* v. *Railoc of Indiana, Inc.*, 456 F.2d 706, 710 (7th Cir. 1976).

III.

The client is no longer simply the person who walks into a law office.[8] A lawyer employed by a corporation represents the entity[9] but that principle does not of itself solve the potential conflicts existing between the entity and its individual participants.[10]

Three district courts have held that each individual member of an *unincorporated* association is a client of the association's lawyer.[11] In *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927, 930 (7th Cir. 1972), we held that a lawyer who had represented an informal group of 75 franchisees "[b]ecause . . . [he] in effect had represented and benefited every franchisee, . . . could reasonably believe that each one of them was his client."

---

[8] G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978) 43; J. LIEBERMAN, CRISES AT THE BAR (1978) 189.

[9] "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." ABA, Code of Professional Responsibility, EC 5-18.

[10] Hazard, *supra* note 8, at 46-54; Lieberman, *supra* note 8, at 189-91. The potential for conflict also exists for the lawyer for the government. Hazard, at 54; Lieberman, at 191-92.

[11] *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 294 F. Supp. 1148, 1150 (E.D. Pa. 1969) (privilege case); *United States* v. *American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 608, 614 (W.D. Pa. 1967) (privilege case); *Schwartz* v. *Broadcast Music, Inc.*, 16 F.R.D. 31 (S.D.N.Y. 1954).

Here we are faced with neither an ordinary commercial corporation nor with an informal or unincorporated association, but instead with a nation-wide trade association with 350 corporate and 7,500 individual members (448 F. Supp. at 1290) and doing business as a non-profit corporation.

We need not make any generalized pronouncements of whether an attorney for such an organization represents every member because this case can and should be decided on a much more narrow ground.

There are several fairly common situations where, although there is no express attorney-client relationship, there exists nevertheless a fiduciary obligation or an implied professional relation:

> (1) The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.[12]
>
> (2) When information is exchanged between co-defendants and their attorneys in a criminal case, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants, even though that co-defendant is not the one which he represented in the criminal case. *Wilson P. Abraham Const. Corp.* v. *Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977) (disqualification case).
>
> (3) When an insurer retains an attorney to investigate the circumstances of a claim and the insured, pursuant to a cooperation clause in the policy, cooperates with the attorney, the attorney may not thereafter represent a third party suing the insured nor indeed continue to represent the insurer once a conflict of interest surfaces.[13]
>
> (4) In a recent case, where an auditor's regional counsel was instrumental in hiring a second law firm to represent some plaintiffs suing the auditor and where the second firm through such relationship was in a position to receive privileged information, the second law firm, although having no direct attorney-client relationship with the auditor, was disqualified from representing the plaintiffs. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977).
>
> (5) In a recent case in this circuit, a law firm who represented for many years both the plaintiff in an action and also a corporation which owned 20% of the outstanding stock of the defendant corporation, was permitted to continue its representation of the plaintiff but was directed to disassociate itself from representing or advising the corporation owning 20% of defendant's stock. *Whiting Corp.* v. *White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977).

In none of the above categories or situations did the disqualified or disadvantaged lawyer or law firm actually represent the "client" in the sense of a formal or even express

[12] ABA Code of Professional Responsibility, EC 4-1: "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the presentation [preservation] by the lawyer of confidences and secrets of one who has employed or sought to employ him." *Cf.* McCormick on Evidence (2d ed. 1972), § 88, p. 179; "Communications in the course of preliminary discussion with a view to employing the lawyer are privileged though the employment is in the upshot not accepted." *See also, Taylor* v. *Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892, 895 (Ohio Sup. Ct. 1961).

[13] ABA, Opinions of the Committee on Professional Ethics (1967 ed.), Formal Op. 247 (1942). *See also, State Farm Mutual Automobile Ins. Co.* v. *Walker*, 382 F.2d 548 (7th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). For general discussion of conflicts inherent in insurance matters, see H. Drinker, Legal Ethics (1953) 114-18; L. Patterson and E. Cheatham, The Profession of the Law (1971) 237-40.

attorney-client relation. In each of those categories either an implied relation was found or at least the lawyer was found to owe a fiduciary obligation to the laymen.

The professional relationship for purposes of the privilege for attorney-client communications "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice."[14] The affidavits before the district court established that: the Washington counsel for Gulf "was given to believe that the Kirkland firm was representing both API and Gulf;"[15] Kerr-McGee's vice president understood a Kirkland partner to explain that Kirkland was working on behalf of API and also its members such as Kerr-McGee;[16] and Getty's vice president stated that in submitting data to Kirkland he "acted upon the belief and expectation that such submission was made in order to enable [Kirkland] to render legal service to Getty in furtherance of Getty's interests."[17]

A fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged.[18] The Supreme Court approved and transmitted to Congress in 1972 the Federal Rules of Evidence,[19] which included among the lawyer-client privilege rules eventually eliminated by Congress, the following definition:[20]

---

[14] McCormick on Evidence (2d ed. 1972), § 88, p. 179. *See also,* R. Wise, Legal Ethics (1970) 284: "The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought."

[15] Thurmond, paras. 6-8; 448 F. Supp. at 1292.

[16] Hefler, para. 12; 448 F. Supp. at 1294.

[17] Copley, para. 7; 448 F. Supp. at 1294.

[18] Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client.* 55 Bost. U.L. Rev. 61, 66 (1975).

[19] Supreme Court Order, November 20, 1972.

[20] Rules of Evidence for the United States Courts and Magistrates as approved by Supreme Court (West Pub. Co. 1972), Rule 503(a)(1).

> A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

The professional relationship does not arise where one consults an attorney in a capacity other than as an attorney.[21] The district court said that the Kirkland "firm's involvement was that of an expert consultant and researcher." 448 F. Supp. at 1301. The questionnaire sent to 59 oil company members of API represented to the recipients that the Kirkland firm "is acting as an independent special counsel for API."[22] The API letter employing Kirkland expressly said that "[y]our firm will, of course, act as an independent expert counsel."[23] The lobbying-type functions undertaken by Kirkland in this case are not foreign to lawyers and in fact are a common undertaking by Washington, D.C., lawyers. In soliciting confidences from API members, Kirkland did not disavow its capacity as attorneys but came expressly represented as lawyers.

The district court concluded that "the transmission by the oil companies of confidential information on their uranium industries and assets has given rise to justifiable fears that their disclosures will return to haunt them in the present litigation" and "[t]he acquired information appears to be closely related to the subject matter of the Westinghouse complaint." 448 F. Supp. at 1304. The court did not find violations of Canons 4[24] or 5[25] because it could not find an attorney-client relationship

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[21] McCormick on Evidence (2d ed. 1972) § 88, pp. 179-80.

[22] 448 F. Supp. at 1292-93.

[23] 448 F. Supp. at 1292.

[24] ABA, Code of Professional Responsibility. Canon 4: "A lawyer should preserve the confidences and secrets of a client."

[25] ABA, Code of Professional Responsibility, Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client."

on the basis of the narrow agency rules applied. However the court did find a Canon 9[26] violation, but did not believe that such a violation alone should result in disqualification "especially in a case of the present complexity and magnitude" involving a two-city large law firm which had attempted to segregate the substantial number of lawyers working on each matter.

The lower court perceived that "an attorney should be disqualified under Canon 9 only when 'there is a reasonable possibility of improper professional conduct' and 'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.' " 448 F. Supp. at 1304.

Although Kirkland asserted, and the district court agreed, that it constructed a "Chinese wall" between the 8 to 14 Chicago-based attorneys working for Westinghouse and the 6 D.C.-based attorneys working for API, both conceded that William Jentes, one of Kirkland's lead attorneys working on the Westinghouse antitrust complaint, in August 1976 agreed with API task force head Lea, to prepare a legal memorandum analyzing arguments which had been advanced to broaden the scope of existing antitrust laws to outlaw interlocking directorates. Lea forwarded the Kirkland memorandum to the API, which mailed it to its member-company contact officers on September 23, 1976. Despite this breach of the "wall," we do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm.[27] Here there exists a very reasonable

[26] ABA, Code of Professional Responsibility, Canon 9: "A lawyer should avoid even the appearance of professional impropriety."

[27] *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706,710 (7th Cir. 1976). *See also, Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 435 F. Supp. 84, 96 (S.D.N.Y.), *rev'd in part and aff'd in part*, 567 F.2d 225, 229, n.10 (2d Cir. 1977).

possibility of improper professional conduct despite all efforts to segregate the two sizeable groups of lawyers.[28]

Kirkland has argued that the oil companies were aware that Kirkland was representing Westinghouse while it was also representing API, inasmuch as Kirkland sought discovery from Kerr-McGee, Getty and abortively from Gulf, relating to the Richmond litigation, in the way of voluntary interviews, depositions and the production of documents. The point, however, is not that the oil companies were aware that Kirkland represented Westinghouse but whether the oil companies were aware that such representation would lead to Kirkland representing Westinghouse in a lawsuit in which the oil companies would be defendants. As the district court noted, "none of the [Kirkland] Washington attorneys working on the API divestiture assignment knew of the separate Westinghouse antitrust complaint until it was filed in court on October 15 [1976], after the stock exchanges closed on that day." 448 F. Supp. at 1296. If some of Kirkland's own partners were not aware of the Westinghouse antitrust complaint until it was filed, the oil companies can scarcely be presumed to have greater knowledge that it was impending with themselves as some of the defendants. It was Kirkland's duty to keep the oil companies advised of actual or potential conflicts of interest, not the oil companies' burden to divine those conflicts.

Gulf, Kerr-McGee and Getty each entertained a reasonable belief that it was submitting confidential information regarding its involvement in the uranium industry to a law firm

[28] Judge Fairchild notes that he has a different view on this point. It is his understanding that on appeal, Kirkland does not rely on a Chinese wall theory. In his opinion, if it had been established that there was real insulation in all relevant particulars between the lawyers working in the Washington office on the API Report and those working in the Chicago office on the antitrust action, imputation of knowledge to all partners would be eliminated from consideration and a different result may have been appropriate.

which had solicited the information upon a representation that the firm was acting in the undivided interest of each company. Canons 4 and 5, as well as Canon 9, apply. If Kirkland's size and multi-city status had any effect, it was in the direction of encouraging the oil companies to divulge confidential information. Whereas they might show reluctance to entrust their substantial assets and future fortunes to a sole practitioner or small law firm, Kirkland's substance and reputation would tend to comfort any apprehensions and open the lines of communication. In any event, there is no basis for creating separate disqualification rules for large firms even though the burden of complying with ethical considerations will naturally fall more heavily upon their shoulders.

The fact that the two contrary undertakings by Kirkland occurred contemporaneously, with each involving substantial stakes and substantially related to the other, outbalances the client's interest in continuing with its chosen attorney. However, we believe that Westinghouse should have the option and choice of dismissing Gulf, Kerr-McGee and Getty from the antitrust case or discharging Kirkland as its attorney in the case. Substitute counsel has represented Westinghouse in the case since February 17, 1978, so that the impact of any change-over has been somewhat eased.

IV.

The Noranda motion to disqualify Kirkland was based on an entirely different set of circumstances.

Noranda is a Canadian corporation organized under the laws of the Province of Ontario, having its principal place of business in Toronto. In 1965, Kirkland represented Noranda in the formation of a joint venture with Central Farmers Fertilizer Company, a domestic corporation centered in Chicago, Illinois. By that agreement, Noranda and Central formed a Canadian corporation to mine potash in Canada. The only possible nexus

between the Central transaction and the present litigation is Noranda's belief that Kirkland may have learned the name of one of its executives, D.E.G. Schmitt, whose deposition was scheduled. The district court, finding that "[e]ven Noranda admits that Kirkland has alternate public sources of information for Schmitt's identity," found no substantial relationship between the character of a potash joint venture and a uranium price-fixing conspiracy, 448 F. Supp. at 1308.

In 1967, Kirkland, working in conjunction with Noranda's general counsel in Toronto, advised Noranda on the impact of United States' antitrust, corporation, securities and tax laws on a proposed exchange offer involved in Noranda's abortive effort to acquire control of Essex Wire Corporation. The mechanics of the exchange required the formation of a Delaware subsidiary of the Canadian parent corporation. Kirkland organized the American subsidiary, which included the naming of three Kirkland attorneys as incorporators, the holding of the first meeting, and the election of directors. Three Kirkland attorneys studied the antitrust issues which culminated in the preparation of a "Fact Book," which analyzed the competitive impact of the prospective acquisition. Both Noranda and Essex sold copper cable and wire in the United States and Noranda was to become the supplier of Essex's considerable copper requirements.

The tender offer was aborted and on August 1, 1967, Kirkland returned to Noranda all of its personal material. Kirkland simultaneously destroyed the long-hand notes of its attorneys who viewed corporate data. Kirkland has not represented Noranda on any matter since 1967.

Noranda contended that Kirkland gained access in 1965-1967 to its relationship to Noranda Sales Corporation, Ltd. and Kerr-Addison Mines Limited, the first of which tied Noranda into doing business in Illinois and the second of which is involved in the uranium industry. After an exhaustive study of the affidavits and material submitted, 448 F. Supp. at 1306-10,

the district court found no substantial relationship between Kirkland's earlier representation relating to the copper industry and the presently-alleged uranium price-fixing conspiracy which did not begin until 1972. The court concluded that "the Westinghouse complaint concerns a completely different industry and a completely different time." Noranda's relation to Noranda Sales and Kerr-Addison appears in publicly-available documents, such as Noranda's annual reports and Dun and Bradstreet reports.

We do not believe that the district court abused its discretion in concluding that the more than 10-year past representations for two specific matters unrelated to the present case did not warrant disqualification of Kirkland. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976).

Judgment in Appeal No. 78-1545 is affirmed; judgments in Nos. 78-1544, 78-1546 and 78-1547 are reversed and remanded.[29]

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[29] The motions to strike appellee's brief and appendix are denied.

OPINION BY JUDGE SPRECHER

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

July 25, 1978

Nos. 78-1544, 78-1545, 78-1546, and 78-1547

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff-Appellee,
vs.
KERR-McGEE CORPORATION, NORANDA MINES LIMITED, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, and GETTY OIL COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 76-C-3830

Prentice H. Marshall, *Judge.*

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in these causes appealed from be, and the same are hereby, AFFIRMED, with costs, in Appeal No. 78-1545; and REVERSED, with costs, and REMANDED, in Appeals Nos. 78-1544, 78-1546, and 78-1547; in accordance with the opinion of this court filed this date.

CORRECTED COPY
ON AUGUST 21, 1978

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 17, 1978

Nos. 78-1545, 78-1544, 78-1546 and 78-1547

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

WESTINGHOUSE ELECTRIC CORP.,
Plaintiff-Appellee,
vs.
NORANDA MINES LIMITED,
Defendant-Appellants.
WESTINGHOUSE ELECTRIC CORP.,
Plaintiff-Appellee,
vs.
KERR-MCGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED and GETTY OIL COMPANY,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois. Eastern Division.

No. 76-C-3830

Prentice H. Marshall,
Judge.

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* filed in the above-entitled cause by defendant-Appellant Noranda Mines Limited and Plaintiff-Appellee Westinghouse Electric Corporation, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing and suggestions that such rehearings be *in banc* be, and the same are hereby, DENIED.

Circuit Judge Wilbur F. Pell, Jr. would have voted to grant rehearing *in banc* in Nos. 78-1544, 78-1546 and 78-1547 and to deny rehearing *in banc* in No. 78-1545.

Circuit Judge Philip W. Tone did not participate in the consideration of this matter.

Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-
No. 422

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

vs.

KERR-McGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, AND GETTY OIL COMPANY,
Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GLENN W. McGEE,
THOMAS W. JOHNSTON,
BRIAN J. REDDING,
WILLIAM T. McGRATH,
8500 Sears Tower,
Chicago, Illinois 60606,
Attorneys for Respondent Kerr-McGee Corporation.

JONATHAN G. BUNGE,
ROBERT A. CREAMER,
WINNIFRED F. SULLIVAN,
8300 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Respondents Gulf Oil Corporation and Gulf Minerals Canada Limited.

CARL J. SCHUCK,
BRENTON F. GOODRICH,
550 South Flower Street,
Los Angeles, California 90054,

JAMES W. HATHAWAY,
135 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Respondent Getty Oil Company.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 422.

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

vs.

KERR-McGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, AND GETTY OIL COMPANY,
Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED.

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1. Whether, when eight courts of appeals agree that orders denying motions to disqualify counsel are immediately appealable, this Court should grant certiorari to review the issue of appealability of such orders where petitioner deliberately elected not to raise that question in the Court of Appeals.

2. Whether the Court of Appeals correctly held that Kirkland & Ellis must be disqualified from representing petitioner in a lawsuit against respondents alleging conflicting positions with respect to the same subject matter on which Kirkland was also representing respondents' interests before Congress.

STATUTES INVOLVED.

Title 28, United States Code, provides in pertinent part:

§ 1292. Interlocutory decisions

. . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE.

This case arises out of the simultaneous representation of conflicting interests by one law firm—Kirkland & Ellis—culminating on October 15, 1976 in two documents, one commending respondents' competitive performance in the uranium industry and the other (the complaint herein) charging that respondents have engaged in anticompetitive practices in that industry.

Respondents Kerr-McGee, Gulf and Getty are three oil companies engaged in producing and marketing uranium. Proposals to require horizontal divestiture by oil companies of interests in alternative energy resources, including uranium, were presented to Congress in October 1975. These proposals received significant support in Congress and caused great concern to the oil industry. In November 1975 the American Petroleum Institute ("API"), a trade association of which respondents are substantial members, and of which Kerr-McGee and Getty are directors, began a major lobbying effort to defeat the horizontal divestiture legislation.

In February 1976, the law firm of Kirkland & Ellis ("Kirkland") was retained by the API to perform "lobbying-type functions" on behalf of API and certain of its members in connection with opposing the proposed legislation. On May 4, 1976, Kirkland partner Fred Rowe was given instructions that his work "should include the preparation of possible testimony, analyzing the probable legal consequences and antitrust considerations of the proposed legislation" and studying "the probable effects on oil companies that would have to divest assets." Kirkland was also to carry out "interviews . . . with a cross-section of industry personnel" and to "act as an independent expert counsel and hold any company information learned

through these interviews in strict confidence, not to be disclosed to any other company, or even to API."(R. App. A4).[1]

Pursuant to a request from Kirkland, a meeting was held at Gulf's office in Denver on May 28, 1976, at which time Kirkland partner Nolan Clark interviewed several executives of Gulf and its subsidiaries on matters pertaining to Gulf's operations in alternative energy fields, including uranium. Among the questions raised in connection with this meeting were the following: what are the barriers to entry in the uranium industry; what is the competitive nature of the industry and is competition increasing or decreasing; what is the nature of oil company uranium reserves; are oil companies aiding uranium production; and have oil companies increased reserves faster than production. During the interview Gulf disclosed confidential matters to Kirkland in the belief that the Kirkland firm was acting as counsel for both API and Gulf with respect to horizontal divestiture of Gulf's uranium business.

Kirkland also requested interviews of Kerr-McGee executives. On June 9, 1976, in Oklahoma City, Nolan Clark interviewed George Cobb, Kerr-McGee Executive Vice-President, and R. J. Hefler, a Vice-President, on matters pertaining to horizontal divestiture, including uranium. After being assured that all information disclosed would be held in confidence, Cobb discussed the current state of the uranium market, including how prices escalated and supplies had tightened, and some of the reasons therefor. Since Kerr-McGee believed Kirkland was representing both API and Kerr-McGee with respect to horizontal divestiture, no attorney other than Clark was present at the meeting.

In addition to these interviews, Getty, Gulf and Kerr-McGee all received questionnaires initiated and developed by Kirkland calling for confidential uranium information, including data on

1. The detailed information concerning uranium operations requested at the interviews and by the written questionnaires is summarized in the opinion of the Court of Appeals (See Respondents' Appendix, pp. A6-A10 (herein cited "R. App.")).

reserves and efforts to develop reserves, for use by Kirkland in representing respondents before Congress. All three respondents submitted this confidential information directly to Kirkland during the summer of 1976 upon the understanding that it would be held in strict confidence.[2]

On October 15, 1976 Kirkland published a 230-page report entitled "Horizontal Oil Company Divestiture and Separation Proposals" opposing the proposed legislation. References to uranium appear throughout the report, which marshalls facts and arguments to show that oil company ownership of coal and uranium has promoted competition in those industries. In particular, the report asserts that current increases in uranium prices are a result of increasing demand and short sales of uranium by Westinghouse, that oil company entry into uranium production has stimulated competition, and that oil companies had no incentive to, and have not, restricted uranium production. The report concludes that "energy industries, both individually and collectively, are competitive today and are likely to remain so." (R. App. A5).

The same day this report was issued praising the oil companies' competitive performance with specific reference to respondents pro-competitive posture in uranium (R. App. A2), Kirkland sued 29 defendants, including Kerr-McGee, Gulf and Getty, alleging they had illegally conspired to restrain trade and competition in the uranium industry.[3] As the District Court concluded, "[a] comparison of the two documents reveals

2. Getty's information was provided in June, and the Gulf and Kerr-McGee questionnaires were returned in August.

3. Kirkland also represents Westinghouse in contract actions resulting from Westinghouse's refusal in 1975 to honor contracts for sale of approximately 65 million pounds of uranium. At that time Westinghouse blamed the rapid increase in uranium prices on the 1973 Arab oil embargo and on governmental action in uranium. Most of the contract actions were consolidated for trial in the Eastern District of Virginia at Richmond. Although respondents, following a written request from Judge Merhige actively soliciting their cooperation, provided information to Westinghouse in the Richmond case, none were informed that Westinghouse intended to sue them.

a rather basic conflict in their contentions and underlying theories." 448 F. Supp. at 1295. That court further observed: "[p]erhaps in recognition of the diametrically opposing theories of the API report and the Westinghouse complaint, Kirkland does not attempt to rebut the oil companies' charges that it has simultaneously taken inconsistent positions on competition in the uranium industry." 448 F. Supp. at 1296.

Kirkland's complaint in this case contradicts the pro-competitive conclusions of Kirkland's expensive and extensive report, and not only destroyed the report's effectiveness but also that of Fred Rowe as a congressional witness opposing horizontal divestiture legislation. Nevertheless, at no time prior to the filing of this action did Kirkland advise Kerr-McGee, Gulf or Getty of any plan to initiate litigation against them, despite the fact that Kirkland's Chicago lawyers who were preparing the complaint against respondents were well aware that their partners were working on behalf of API and respondents. In fact, William Jentes, one of Kirkland's lead attorneys in the antitrust case, prepared a legal memorandum in August 1976 for use by API in opposing horizontal divestiture of oil company assets. (R. App. A19). The Kirkland memorandum was mailed to respondents, and others, on September 23, 1976.[4]

In January 1977, before answers had been filed by respondents to Kirkland's complaint, Kerr-McGee, Gulf and Getty moved to disqualify Kirkland from representing Westinghouse in this action because of its contemporaneous and conflicting representation of Westinghouse and respondents. Pending determination of the disqualification motions the District Court stayed all discovery by Kirkland against the moving defendants.[5]

4. Although Kirkland now appears to argue it constructed a "Chinese Wall" between its offices, its own admissions destroy this theory. The Jentes memo and the knowledge of Kirkland's Chicago lawyers demonstrate the fallacy of the "Chinese Wall" argument.

5. In February 1978, the Chicago law firm of Freeman, Rothe, Freeman & Salzman (the "Freeman firm") was engaged to represent Westinghouse pending resolution of the disqualification motions, and

(Footnote continued on next page.)

On April 18, 1978, the District Court issued an opinion finding a basic conflict between the API report prepared by Kirkland and the Complaint in this action and finding further that the respondents had "justifiable fears that their disclosures will return to haunt them." (R. App. A18.) The District Court further found that Kirkland had violated Canon 9 of the Code of Professional Responsibility, but declined to disqualify them. That court ruled that there had been no violation of the fiduciary obligations imposed by Canons 4 and 5 of the ABA Code of Professional Responsibility because no attorney-client relationship existed between Kirkland and the respondents.

On July 25, 1978, the Court of Appeals for the Seventh Circuit reversed, holding that the District Court had improperly limited its consideration to technical principles of agency law to determine whether the fiduciary obligations imposed by Canons 4 and 5 of the Code of Professional Responsibility were applicable to Kirkland's representation of respondents, and had improperly created a special category or exemption from the provisions of the canons for "large, multi-city" firms like Kirkland, which exemption was not applicable to other members of the bar. The court found that all relevant facts established an attorney-client relationship, and that Kirkland's conflict of interest violated Canons 4 and 5, as well as Canon 9. The Court of Appeals gave Westinghouse the option of replacing Kirkland as counsel, or dismissing the action against respondents.

(Footnote continued from preceding page.)

the District Court modified its stay order to permit the Freeman firm to conduct discovery on behalf of Westinghouse. On September 13, 1978 the New York law firm of Donovan, Leisure, Newton & Irvine entered its appearance as additional counsel for Westinghouse and both firms are now actively prosecuting the case.

REASONS FOR DENYING THE WRIT.

The Kirkland firm was disqualified from representing petitioner Westinghouse, plaintiff in this antitrust litigation against respondents Kerr-McGee, Gulf and Getty, 3 of 29 named defendants, because Kirkland, while preparing to file this case against those 3 defendants, accepted and carried out a legal engagement on behalf of those companies to oppose congressional proposals concerning the same subject matter involved in the lawsuit. In the course of that engagement, Kirkland solicited and used confidential information from each of these three companies, each of which was led to believe Kirkland was acting in its interest. This indisputable and simultaneous conflicting representation resulted in some Kirkland lawyers issuing a "white paper" praising the competitive performance of Kerr-McGee, Gulf and Getty in the uranium industry on the same date that other Kirkland lawyers filed the present complaint condemning the same three companies for alleged violations of the antitrust laws in the same industry.

The espousal of what the District Court described as "diametrically opposing theories" by the same law firm on the same subject matter was conduct which both courts below found to be in violation of Canon 9 of the ABA Code of Professional Responsibility and which the Court of Appeals also found to be in violation of Canons 4 and 5 of the Code.

The sole issue for review is whether, in these particular factual circumstances, this particular law firm should have been disqualified (or these respondents dismissed as defendants). This hardly qualifies as a "special and important" issue under Supreme Court Rule 19. The case is active in the District Court with Westinghouse being represented by two able law firms, one having entered the case while the disqualification motions were

pending in the District Court and the other having entered after the Court of Appeals disqualified Kirkland. These two well-known antitrust firms are prosecuting the case with vigor. Whatever importance the antitrust issues in the case may have as a matter of public interest is irrelevant to the disqualification of Kirkland, despite petitioner's protestations to the contrary.

The disqualification motions were decided, by agreement of all parties, on the basis of affidavits, exhibits and argument of counsel. No hearing or oral testimony was involved. The facts here are undisputed. Only the legal question as to the necessary consequences of those facts was decided by the Court of Appeals.

Based on this completely documentary record, the Court of Appeals affirmed the District Court's findings of the violation of Canon 9 and corrected that court's conclusion that an attorney-client relationship sufficient to invoke Canons 4 and 5 can arise only from formalistic compliance with the technical rules of agency. The Court of Appeals confirmed the high standards of conduct expected from lawyers in their dealings with laymen, holding that Canons 4 and 5 will be invoked when a lawyer performs a lawyer's function based on confidential information solicited and obtained from persons whose interests the lawyer was protecting.

The Court of Appeals also confirmed the essential principle that there cannot be one set of ethical standards for a large law firm in complex litigation and another for the rest of the bar. Disqualification of the offending firm, or dismissal of the offended parties, was the only appropriate remedy for this ethical violation. This is not a novel or unique ruling requiring the action of this Court. Given the narrow factual posture of this case, review by this Court would produce judicial guidelines of only limited applicability.

Here both courts below found the disqualification motions to be in good faith raising serious ethical problems. The question of appealability was not raised by the petitioner at any point in the proceedings below and, in fact, Kirkland's lead attorney

in the District Court informed that court that denial of such order was appealable. By thus conceding the issue of appealability, Kirkland effectively deprived this Court of any briefing or consideration of the question by the Court of Appeals and effectively prevented respondents from proceeding by way of certification under 28 U. S. C. § 1292(b), or by writ of mandamus under 28 U. S. C. § 1651. As held by eight courts of appeal, ethical violations of the nature described above must be promptly reviewable to maintain public confidence in the bench and bar. Discretionary review by this Court is inappropriate and the petition should be denied.

I.

THE APPEALABILITY OF THIS DISQUALIFICATION ORDER DOES NOT REQUIRE REVIEW BY THIS COURT.

A. Kirkland's Conduct Below Should Preclude Petitioner from Raising the Appealability Issue Here.

Kirkland raises for the first time in the petition for certiorari the issue of the appealability under 28 U. S. C. § 1291 of an order denying disqualification. In neither the District Court nor the Court of Appeals did the petitioner contend that such an order was not immediately appealable. Not once in its 56 page brief on the disqualification issue or its 18 page Petition for Rehearing did Kirkland claim that the Seventh Circuit lacked jurisdiction to review the denial of disqualification. Nor did Kirkland raise the issue with the trial judge when he denied respondents' motion to stay Kirkland's participation pending appeal. In fact, Fred Bartlit, Kirkland's lead attorney, asserted in a hearing before the District Court that orders denying attorney disqualification are appealable, thus effectively preventing respondents from pursuing the avenue of certification by the District Court to permit immediate appeal under 28 U. S. C.

§ 1292(b) or from proceeding by way of mandamus under 28 U. S. C. § 1651.[6]

Although this Court may review jurisdictional questions at any time, the issue of immediate appealability is not ripe in this case. Kirkland's action precluded any briefing or consideration of the question in the Court of Appeals, thus depriving this Court of the focus such proceedings below afford and which this Court normally expects.[7] In these circumstances, this Court should exercise its discretion to deny the writ.

B. Immediate Review by the Court of Appeals Was Necessary to Remedy the Serious Ethical Transgressions Present Here.

The Court of Appeals correctly stated that the District Court's order denying disqualification was immediately appealable under the collateral order doctrine enunciated in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), which it had previously held to be applicable to disqualification orders in *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706 (7th Cir. 1976). The Second, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have also held that orders denying disqualification are appealable under the collateral order doctrine of *Cohen*.[8] The First Circuit

6. The district judge himself raised the question of certification but was assured by Mr. Bartlit that it was not necessary because the order was appealable. (R. App. A25).

7. *United States* v. *Ortiz*, 422 U. S. 891, 898 (1975); *Bivens* v. *Six Unknown Named Agents*, 403 U. S. 388, 397 (1971); *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147 (1970); *Neely* v. *Eby Construction Co.*, 386 U. S. 317, 330 (1967); *California* v. *Taylor*, 353 U. S. 553, 557, n. 2 (1957).

8. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F. 2d 800 (2d Cir. 1974); *Greene* v. *Singer Co.*, 509 F. 2d 750 (3d Cir. 1971), *cert. denied*, 409 U. S. 848 (1972); *MacKethan* v. *Peat, Marwick, Mitchell & Co.*, 557 F. 2d 395 (4th Cir. 1977); *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F. 2d 333 (5th Cir. 1961); *Melamed* v. *ITT Continental Baking Co.*, 534 F. 2d 82 (6th Cir. 1976); *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F. 2d 602 (8th Cir. 1977), *cert. denied*, ... U. S. ..... (1978); *Fullmer* v. *Harper*, 517 F. 2d 20 (10th Cir. 1975).

has not addressed the issue. The D. C. Circuit is the only Circuit which has refused to pass judgment on lower court orders denying disqualification prior to final judgment. *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F. 2d 1022 (D. C. Cir. 1976).[9] That court based its decision on the existence of alternative methods of appeal available through certification under § 1292(b) or mandamus under § 1651, from which respondents here have been effectively blocked by Kirkland's action below.

The D. C. Circuit decision in *Community Broadcasting* subordinates the serious questions of lawyers' professional responsibility to speculative fears that making denials of disqualification motions immediately appealable will encourage the filing of frivolous motions interposed for delay. 546 F. 2d at 1027.[10] But the reported decisions, including the present case, show that most disqualification motions are not frivolous or filed merely for delay.[11] They are made in good faith and raise serious issues which affect the public confidence in the bench and bar, as well as the professional relationship between lawyer and client. The appeal in this case was resolved in less than three months. Surely it is no waste of appellate court time to speedily resolve

9. The Ninth Circuit decision, *Cord* v. *Smith*, 338 F. 2d 516 (9th Cir. 1964), *clarified*, 370 F. 2d 418 (9th Cir. 1966), cited by petitioner, cannot be aligned with the *Community Broadcasting* case on the question of review of orders denying disqualification. The Ninth Circuit has departed from the approach it took in *Cord*, and now appears to adhere to the majority view announced by the Second Circuit *en banc* in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F. 2d 800 (2d Cir. 1974). See, *Trone* v. *Smith*, 553 F. 2d 1207 (9th Cir. 1977).

10. The Eighth Circuit responded to the D. C. Circuit's concern about delay as follows: "[W]e consider the risk [of delay] insufficient to warrant an insistence that trials be conducted under a cloud of potential disqualification. Moreover, disciplinary powers of courts are available to deal with unfounded motions to disqualify and frivolous appeals from their denial." *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F. 2d 602, 607 (8th Cir. 1977), *cert. denied*, ... U. S. ..... (1978).

11. The District Court here specifically so stated with respect to the instant motion in a hearing on a stay on April 24, 1978. (R. App. A27).

these types of questions rather than let them linger in uncertainty until final judgment which may not come until years later. A "business first—ethics later" attitude is not befitting our profession and would not be favorably perceived by the public.[12]

Kirkland argues that orders denying disqualification do not come within the collateral order doctrine of *Cohen*, but as eight courts of appeals have found, such orders meet all the *Cohen* standards in that they (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment.[13]

Especially important in the context of this case is the perception of the public, whose loss of confidence in the bar would be irremediable if ethical transgressions are not immediately reviewable.[14] The canons of ethics are intended to have

12. The *Community Broadcasting* case has been effectively criticized in Comment, Orders Denying Disqualification of Counsel, 30 Vand. L. Rev. 259 (1977).

13. Kirkland's argument that there is no cognizable injury from an ethical transgression unless an adverse verdict is rendered against the aggrieved parties (Pet. p. 15), is an assertion that the canons of ethics are irrelevant unless monetary considerations are involved. The taint that occurs from the renunciation of the obligations of confidentiality and loyalty imposed by Canons 4 and 5 when an attorney sues his current client cannot be adequately removed after trial, nor can the client's "justifiable fears that their disclosures will return to haunt them in the present litigation" (R. App. A18) be effectively reviewed after trial. See *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F. 2d 800, 805 (2d Cir. 1976). It has been noted that appellate courts are hesitant to reverse collateral trial court orders after final judgment, so that it is unlikely that there will be an objective determination of the ethical considerations in a post-trial appeal. In contrast, where immediate appeal has been allowed on denials of disqualification, the reversal rate is approximately fifty percent. Comment, Orders Denying Disqualification of Counsel, 30 Vand. L. R. 259, 271-272 (1977). Refusing to allow immediate appeals could thus have the effect of diluting the standards of the canons of ethics.

14. *See, Cinema 5 Ltd.* v. *Cinerama, Inc.*, 528 F. 2d 1384, 1387 n. 1 (2d Cir. 1976), where the Court explained that while prophylactic orders and Chinese walls may alleviate the judge's or lawyer's qualms, this same confidence could not be imparted to the public "by court order".

a prophylactic effect, *Emle Industries, Inc.* v. *Pantetex*, 478 F. 2d 562, 571 (2d Cir. 1973), which would be destroyed if good faith allegations of conflicts of interest cannot be reviewed by the Court of Appeals prior to final judgment.[15] This would result in the diminution of public confidence in lawyers generally, as well as in the willingness of clients to candidly disclose information to their lawyers. As the Second Circuit stated in *Silver Chrysler, supra*, 496 F. 2d at 805, "it is fatuous to suppose that review of the final judgment will provide adequate relief" from orders denying disqualification.

A practical approach to the matter demands immediate resolution by the appellate court. In the present case it is probable that a final judgment will not be entered until 1981 or later. It is difficult to justify a rule which would cause the parties at that late date to start all over again when, as the Court of Appeals unanimously held, the District Court's denial of disqualification was erroneous. The consequence here would be the waste of years of preparation and millions of dollars. There is no logical reason to believe that the Court of Appeals' unanimous opinion would be any different after years of pretrial and trial proceedings. Contrary to the views of petitioner, deferring review would create a real potential for delay by increasing the risk of a second trial. Only immediate review can avoid needless expenditure of judicial, attorney, and client time. *Silver Chrysler, supra*, 496 F. 2d at 806.

No lawyer should be permitted to sue his present client. Only when such ethical transgressions are immediately remediable by prompt appeal can the public be expected to repose the confidence in lawyers which is so necessary to the successful and responsible accomplishment of the lawyer's tasks and the proper functioning of the judicial system.

15. In those instances where a challenge to counsel is clearly frivolous, procedural avenues are available to allow summary dismissal of the appeal. See Rule 15 of the Rules of the U. S. Court of Appeals for the Seventh Circuit. See also, F. R. App. P. 38 which allows a court of appeals to award damages and costs for a frivolous appeal.

II.

THE COURT OF APPEALS' DECISION WAS CORRECT AND PRESENTS NO ISSUE JUSTIFYING REVIEW BY THIS COURT.

A. The Court of Appeals Correctly Held That the Undisputed Facts Established an Attorney-Client Relationship Sufficient to Invoke the Obligations of the Code of Professional Responsibility.

Petitioner is able to assert that the Court of Appeals' conflict of interest standard is "unprecedented" only by substantially mischaracterizing the court's holding. Kirkland argues that the court held that a fiduciary obligation may be imposed upon an attorney by a party's litigation affidavit claiming that the party unilaterally believed the attorney was acting on his behalf. (Pet. at pp. 19, 22, 9.) However, the Court of Appeals made it quite clear that Kirkland's attorney obligations were based upon the totality of Kirkland's conduct, not simply "belief" alone. The Court explicitly noted the undisputed facts that Kirkland concluded that it needed access to confidential oil company information not publicly available, that Kirkland itself solicited such information from the oil company in its interviews and its questionnaires carefully promising that such disclosures would be held by Kirkland in strict confidence,[16] and that these steps constituted professional legal services necessary to carry out Kirkland's duties as counsel in resisting horizontal divestiture.

On those facts, and not just because of the respondents' belief regarding Kirkland's role, the court quite properly rejected the District Court's holding that, regardless of what Kirkland had done, unless it could be shown to have given subjective consent to act as the oil companies' attorneys, it was free of any

16. The court noted that such information was submitted ". . . to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company. Canons 4 and 5, as well as Canon 9, apply." (R. App. A20).

obligation to them.[17] Instead, the Court of Appeals found Kirkland's conduct constituted the implied undertaking necessary to establish a professional relationship giving rise to Kirkland's obligation under Canons 4 and 5, as well as Canon 9.

The Court of Appeals also properly rejected Kirkland's attempt to shift the burden of discerning Kirkland's conflict to the client, holding that it was "Kirkland's duty to keep the oil companies advised of actual or potential conflicts of interest, not the oil companies' burden to divine those conflicts." (R. App. A20). The court noted that the record disclosed that some of Kirkland's own partners were kept unadvised of the antitrust complaint until after it was filed, and the oil companies could not be presumed to have greater knowledge of Kirkland's plan than did those Kirkland lawyers.

Petitioner cites no decision by this Court and no authority elsewhere which supports its insistence upon subjective consent as opposed to actions which imply an undertaking to be bound by the ethical obligations of a fiduciary relationship. Indeed, its authorities are to the contrary, or are factually inapposite.[18]

Kirkland's final assertion (Petition 20-21) is that the Court of Appeals erred in failing to create special rules exempting it, and

17. The District Court indicated an attorney-client relationship could be implied from performance of a purely legal service (like appearing in court or drafting a contract) but not from the service here—lobbying against proposed legislation. The Court of Appeals rejected such a narrow view of a lawyer's responsibility. (R. App. A14, A18).

18. The section of Corpus Juris Secundum relied on by petitioner (Pet., p. 18, fn. 19) instead supports respondents, since it acknowledges that an attorney-client relationship may be founded upon an implied undertaking, as found by the Court of Appeals (C. J. S. Attorney and Client, § 65, p. 848). *Committee on Professional Ethics & Grievances* v. *Johnson*, 447 F. 2d 169, 174 (3d Cir. 1971) was decided on procedural grounds and did not reach the ethical questions presented. Similarly inapposite is *In re Yarn Processing Patent Validity Litigation*, 530 F. 2d 83, 90 (5th Cir.), *rehearing denied*, 536 F. 2d 1025 (5th Cir. 1976), where the challenged counsel, unlike Kirkland, neither solicited nor received confidential information.

other large multi-city firms, from well-settled ethical precepts (including imputation of knowledge confided to some partners in a firm to other partners of that firm)[19] which apply to the remainder of the bar. Implementation of such a rule would seriously undermine public confidence in the bench and bar, and inhibit the ability of clients to freely disclose confidences to their counsel. The Court of Appeals' decision to apply the canons in an even-handed manner to all members of the bar is correct, and there exists no need for this Court to review that decision.[20]

B. The Court of Appeals Did Not Ignore the District Court's Findings of Fact.

Petitioner complains that the Court of Appeals improperly overturned or ignored the District Court's findings of fact.[21] However, there is no instance in which the Court of Appeals found any fact contrary to the District Court. On the contrary, the only dispute between the Court of Appeals and the District Court is the legal standard by which to review the undisputed facts. Thus, the Court of Appeals correctly held that the District Court applied the wrong legal standard by determining Kirkland's ethical obligations solely on the basis of a technical analysis of agency principles, while overlooking the substance of the relationship disclosed by the undisputed factual record.

19. See *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706, 710 (7th Cir. 1976); *Laskey Bros.* v. *Warner Bros. Pictures, Inc.*, 224 F. 2d 824, 826-827 (2d Cir. 1955), *cert. denied*, 350 U. S. 932, 76 S. Ct. 300, 100 L. Ed. 814 (1956).

20. Kirkland's professed concern over enforcement of the antitrust laws if large firms are inhibited in attempts "to maintain diversity in their practice" is misplaced. Kirkland was replaced in this action by a large well-known firm—Donovan, Leisure, Newton & Irvine. The rule applied by the Court of Appeals will only inhibit those who would accept conflicting representations in their attempts to increase the "diversity" of their practice.

21. The disqualification matter was heard by agreement on the affidavits submitted by petitioner and respondents. The Court of Appeals was equally well equipped to ascertain the proper conclusions to be drawn from the undisputed facts contained in the documentary record.

C. The Court of Appeals Properly Determined That the Conflict of Interest Required Disqualification of Kirkland or Dismissal of Respondents.

The Court of Appeals, after finding a violation by Kirkland of Canons 4, 5 and 9 of the Code of Professional Responsibility concluded that the nature of the violation—suing its own clients on a subject while representing them in the same crucial subject matter and while possessing confidential disclosures from such clients—required disqualification of Kirkland or dismissal of the respondents. This conclusion was based upon a proper application of relevant law to the particular facts in this action.[22] It presents no basis for review by this Court.

22. *See, e.g., IBM* v. *Levin*, 579 F. 2d 271, 282-283 (3rd Cir. 1978); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562, 570-571 (2d Cir. 1973). Petitioner would apparently have the Court believe that there is no law firm other than Kirkland & Ellis which is capable of effectively representing Westinghouse in this matter. Petitioner is now represented in the District Court by two experienced antitrust firms who are aggressively prosecuting the case. This fact alone renders insignificant the "public interest" arguments advanced by petitioner and negates entirely the notion that the disqualification of Kirkland poses a vital threat to Westinghouse's very existence.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GLENN W. McGEE,
THOMAS W. JOHNSTON,
BRIAN J. REDDING,
WILLIAM T. McGRATH,
8500 Sears Tower,
Chicago, Illinois 60606,
Attorneys for Respondent Kerr-McGee Corporation.

JONATHAN G. BUNGE,
ROBERT A. CREAMER,
WINNIFRED F. SULLIVAN,
8300 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Respondents Gulf Oil Corporation and Gulf Minerals Canada Limited.

CARL J. SCHUCK,
BRENTON F. GOODRICH,
550 South Flower Street,
Los Angeles, California 90054,

JAMES W. HATHAWAY,
135 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Respondent Getty Oil Company.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 78-1544, 78-1545, 78-1546 and 78-1547

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff-Appellee,

vs.

KERR-McGEE CORPORATION, NORANDA MINES LIMITED, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, and GETTY OIL COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-3830—Prentice H. Marshall, *Judge.*

ARGUED JUNE 12, 1978—DECIDED JULY 25, 1978

Before FAIRCHILD, *Chief Judge,* SPRECHER and BAUER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The novel issues on this appeal are (1) whether an attorney-client relationship arises only when both parties consent to its formation or can it also occur when the lay party submits confidential information to the law party with reasonable belief that the latter is acting as the former's attorney and (2) whether the size and geographical scope of a law firm exempt it from the ordinary ethical considerations applicable to lawyers generally.

The four separate appellants are some of the defendants in this antitrust case who were each denied their motions to disqualify the law firm of Kirkland and Ellis ("Kirkland") from further representing the plaintiff, Westinghouse Electric Corporation ("Westinghouse"). Whether fortuitously or by design, on the same day, October 15, 1976, Kirkland, while representing the American Petroleum Institute ("API"), of which three of the appellants, Gulf Oil Corporation ("Gulf"),[1] Kerr-McGee Corporation ("Kerr-McGee") and Getty Oil Company ("Getty"), were members, released a report which took an affirmative position on the subject of competition in the uranium industry, while simultaneously filing this lawsuit, representing Westinghouse, seeking to establish an illegal conspiracy in restraint of trade in the uranium industry.

The fourth appellant, Noranda Mines Limited ("Noranda"), asserts a different conflict of interest in Kirkland resulting from its prior representation of Noranda from 1965 to 1967 in several matters.

The complaint in this case was filed on October 15, 1976 and the four appellants moved to disqualify Kirkland in January and February 1977. On April 18, 1978, the district court filed a lengthy memorandum followed by orders denying the disqualification motions. *Westinghouse Electric Corp.* v. *Rio Algum Limited*, 448 F. Supp. 1284 (N. D. Ill. 1978). These appeals followed. This court has jurisdiction under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949). *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706, 709 (7th Cir. 1976).

I

On September 8, 1975, Westinghouse, a major manufacturer of nuclear reactors, notified utility companies that 17 of its long-term uranium supply contracts had become "commercially impracticable" under § 2-615 of the Uniform Commercial Code. In response, the affected utilities filed 13 federal actions, one state action, and three foreign actions against Westinghouse, alleging breach of contract and challenging Westinghouse's invocation of § 2-615. The federal actions were consolidated for trial in the Eastern District of Virginia at Richmond under MDL Docket No. 235.

1. Gulf Minerals Canada Limited is also a defendant but for convenience hereafter is included with Gulf Oil Corporation as "Gulf."

As an outgrowth of its defense of these contract actions, Westinghouse on October 15, 1976, filed the present antitrust action against 12 foreign and 17 domestic corporations engaged in various aspects of the uranium industry.

Kirkland's representation of Westinghouse's uranium litigation has required the efforts of 8 to 14 of its attorneys and has generated some $2.5 million in legal fees.

Contemporaneously with its Westinghouse representation in the uranium cases, Kirkland represented API, using six of its lawyers in that project.

In October, 1975, Congress was presented with legislative proposals to break up the oil companies, both vertically by separating their control over production, transportation, refining and marketing entities, and horizontally by prohibiting cross-ownership of alternative energy resources in addition to oil and gas. Since this proposed legislation threatened oil companies with a potential divestiture of millions of dollars of assets, in November, 1975, the API launched a Committee on Industrial Organization to lobby against the proposals. On December 10, 1975, API's president requested that each company designate one of its senior executives to facilitate coordination of the Committee's activities with the individual companies.

The Committee was organized into five task forces. The Legal Task Force was headed by L. Bates Lea, General Counsel of Standard Oil of Indiana, assisted by Stark Ritchie, API's General Counsel.

On February 25, 1976, Ritchie wrote to Frederick M. Rowe, a partner in Kirkland's Washington office, retaining the firm to

review the divestiture hearings and "prepare arguments for use in opposition to this type of legislation." On May 4, 1976, Ritchie added that the Kirkland firm's work for API "should include the preparation of possible testimony, analyzing the probable legal consequences and antitrust considerations of the proposed legislation" and "you should make an objective survey and study of the probable effects of the pending legislation, specifically including probable effects on oil companies that would have to divest assets." Ritchie noted that "[a]s a part of this study, we will arrange for interviews by your firm with a cross-section of industry personnel." The May 4 letter to Rowe concluded with:

> Your firm will, of course, act as an independent expert counsel and hold any company information learned through these interviews in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data.

On May 25, 1976, Ritchie sent to 59 API member companies a survey questionnaire seeking data to be used by Kirkland in connection with its engagement by API. In the introductory memorandum to the questionnaire, Ritchie advised the 59 companies that Kirkland had "ascertained that certain types of data pertinent to the pending anti-diversification legislation are not now publicly available" and the API "would appreciate your help in providing this information to Kirkland. . . ." The memorandum included the following:

> Kirkland, Ellis & Rowe is acting as an independent special counsel for API, and will hold any company information in strict confidence, *not to be disclosed to any other company, or even to API,* except in aggregated or such other form as will preclude identifying the source company with its data.

(Emphasis in original). The data sought was to assist Kirkland "in preparing positions, arguments and testimony in opposition

to this type of legislative [divestiture]" and was not to be sent to API but rather to Kirkland.

Pursuant to the provision in Ritchie's May 4, 1976 letter to Rowe that interviews would be arranged with a cross-section of industry personnel, Nolan Clark, a Kirkland partner, interviewed representatives of eight oil companies between April 29 and June 15, 1976.

After going through several drafts, the final Kirkland report to API was released on October 15, 1976. The final report contains 230 pages of text and 82 pages of exhibits. References to uranium appear throughout the report and uranium is the primary subject of about 25 pages of text and 11 pages of exhibits. The report marshalls a large number of facts and arguments to show that oil company diversification does not threaten overall energy competition. In particular the report asserts that the relatively high concentration ratios in the uranium industry can be expected to decline, that current increases in uranium prices are a result of increasing demand, that oil company entry into uranium production has stimulated competition and diminished concentration, that oil companies have no incentive to act in concert to restrict coal or uranium production and that the historical record refutes any charge that oil companies have restricted uranium output. The report concludes that "the energy industries, both individually and collectively, are competitive today and are likely to remain so." 448 F. Supp. at 1296.

As noted at the outset of this opinion, the API report was issued on the same day as the present antitrust suit was filed against several defendants, including Gulf, Kerr-McGee and Getty.

The district court concluded that "[a] comparison of the two documents reveals a rather basic conflict in their contentions and underlying theories." 448 F. Supp. at 1295. The court also observed that "[p]erhaps in recognition of the diametrically opposing theories of the API report and the Westinghouse com-

plaint, Kirkland does not attempt to rebut the oil companies' charges that it has simultaneously taken inconsistent positions on competition in the uranium industry." 448 F. Supp. at 1296.

Gulf, Kerr-McGee and Getty are substantial dues-paying members of API. Kerr-McGee and Getty are also represented on API's board of directors.

At Ritchie's request, the cross-section interviews were mainly arranged by Gerald Thurmond, Washington Counsel of Gulf Oil Company and a member of API's Antitrust Strategy Group. On May 11, 1976, Thurmond advised Gulf officials that Nolan Clark of Kirkland planned to visit them. Attached to Thurmond's letter were the questions "which will be covered" in the meeting.[2]

2. The questions were prepared by Nolan Clark as "the kinds of questions I might want to ask":

> In which alternative energy businesses is your company engaged? How, when, and why did your company enter these businesses?
>
> What assets would your company have to divest in order to get out of alternate energy businesses?
>
> Of the affected assets, could some be divested in the form of independent operating entities? Which? Could other affected assets be sold to other presently existing entities? Which? Are you in some alternate energy businesses which could not be sold, but rather would have to be liquidated? If so, what would your estimate losses be?
>
> Would your divestiture of alternative energy businesses violate any contractual provisions of your loan or debenture agreements? Other contractual arrangements? If so, which? Would you anticipate any serious problems in renegotiating contractual provisions? If so, what kind of problems?
>
> Would you anticipate any problems of disposing of alternative energy assets? If so, what kind of problems? Are your leaseholds assignable? Would you have to sever coal & uranium mineral rights from other mineral rights? Would this cause any significant problems?
>
> Would you anticipate any problem in receiving a fair market price for assets to be divested? If so, what kind of problems and why?
>
> The statement has been made that oil and gas companies can easily divest alternate energy businesses by "spinning off" companies with those assets. Is this statement accurate?

(Footnote continued on next page.)

The meeting was held on May 28, 1976 in Denver. Nolan Clark represented Kirkland. In attendance for Gulf were six vice presidents, a comptroller and a regional attorney. Also present was a Harvard professor who "also is working with API

(Footnote continued from preceding page.)

> What specific problems do you foresee arising by the possible passage of horizontal divestiture legislation? short-term? long-term?
>
> Who if anyone would you expect to be affected adversely by horizontal divestiture? How any why?
>
> How do the problems of divestiture compare under the following scenarios: (1) the company has a given number of years to get out of alternate energy businesses subject to criminal sanctions, and (2) the company would be required to get out of alternate energy businesses in accordance with judgments entered in civil actions to be brought by Attorney General?
>
> What effect do you think passage of a horizontal divestiture bill would have on your long and short term investment plans?
>
> Do you expect that passage of horizontal divestiture legislation would affect your ability to raise capital?
>
> Are your non-oil and gas energy assets managed separately from oil and gas assets? What overlaps are there between them?
>
> Have you found that your oil and gas expertise and resources have been of any particular value as you have developed alternate energy sources? If yes, how?
>
> Do petroleum companies have specific assets that are uniquely valuable to alternative energy sources?
>
> Do you expect the same rate of return for oil drilling, coal production, uranium exploration?
>
> If an oil company owns alternative fuel possibilities, would you reasonably expect a coal division of that company to try to undersell the oil division on a BTU equivalent basis, or nuclear division to do the same thing?
>
> Do you attempt to sell oil, natural gas, coal and uranium at BTU equivalent prices? If so, why? If not, why not? Over the long run do you expect alternative energy sources to have BTU equivalent prices? Are long-run investments made, based upon this expectation?
>
> Will oil companies with substantial interests in oil production be reluctant to develop low cost alternative sources of energy, *e.g.*, oil shale?
>
> Are you presently developing coal reserves, uranium reserves? At what rate? If you do not presently plan to develop certain reserves within the near future, why not?
>
> Do you know of any oil or gas companies that have lower cost alternate sources of energy that they are not developing?

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on the same subject." The meeting lasted more than two hours followed by lunch, during which discussions continued. After the meeting and in three letters from Gulf vice president Mingee to Clark dated August 10, 11 and 13, Gulf submitted specific information sought by Clark through the questionnaire and other

(Footnote continued from preceding page.)

Under what economic conditions do you think it would make sense for an oil or gas company to acquire and not develop alternate energy sources?

With respect to coal as a synthetic fuel source, is there any fundamental economic reason why a completely new synthetic fuel industry should not develop, separate from conventional fuel industries?

When do you expect commercially feasible coal liquifaction? Coal gasification? Production of oil from oil shale? From tar sands? What magnitude of capital investments do you anticipate will be required in these various areas to reach the stage of commercial development?

Have the oil companies blocked coal liquefaction research?

If coal becomes a major sources of methane-based pipeline gas, what would be the consequences on the coal market if integrated petroleum companies are both buyers and sellers of gas and coal?

Where are the benefits from the entry of oil companies into coal?

Have oil companies increased their holdings of coal reserves faster than they have increased coal production? Are the oil companies cementing their control over future, not current, production through coal reserve ownership?

Do oil companies control the most producible and most economical coal reserves?

Is the oil industry aiding coal production?

Is entry into the coal industry difficult because of the shortage of skilled miners and skilled mine managers?

How easy or difficult is entry into the uranium mining and uranium milling businesses?

Is the uranium industry competitive? Is that industry becoming more or less competitive? What evidence could you give to support your answer?

What are the benefits from the entry of oil companies into uranium mining? Into uranium milling?

Are the oil companies aiding uranium production?

Do oil companies control the most producible and most economical uranium reserves?

Have oil companies increased their holdings of uranium reserves faster than they have increased uranium production?

written questions and in each letter Mingee stressed the confidential basis upon which the information was supplied.

Nolan Clark's interview with two Kerr-McGee vice presidents took place in Oklahoma City on June 9, 1976 and lasted about three hours. Clark was given considerable background information on Kerr-McGee's uranium industry, including mining locations, uranium conversion process, and pellet fabrication. On the subject of uranium marketing and pricing, one of the Kerr-McGee vice presidents described the escalating prices and tightening supplies in the current market, and the reasons behind the trends. Kerr-McGee sent its completed questionnaire to Clark on August 25, 1976.

Kirkland did not interview any Getty personnel. However, Getty received the confidential API questionnaire which requested it to estimate the value of its assets subject to proposed divestiture and its research and development outlays in alternative energy fields. Getty completed the questionnaire and mailed its data sheets to Nolan Clark on June 4, 1976, with the understanding that the data would be held in confidence.[3]

3. Nolan Clark had "come to the conclusion that certain information was not then available from publicly available sources" so the following questions were sent to 59 companies, including Gulf, Kerr-McGee and Getty:

I. If it became law, would S.489 apply to your company?

II. If S.489 were to become law, what would be your best good faith estimate of the $$ value of the assets that you would have to divest, in the:

(a) coal business
(b) oil shale business
(c) (1) production, mining & milling of uranium
(2) nuclear fuel cycle
(d) nuclear reactor business
(e) geothermal steam business
(f) solar energy business
(g) other

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II.

The crux of the district court's determination was based upon its view that an "attorney-client relationship is one of agency to which the general rules of agency apply" and "arises *only* when the parties have given their consent, either express or implied, to its formation." 448 F. Supp. at 1300 (emphasis supplied). Although some courts have stated that the attorney-client rela-

(Footnote continued from preceding page.)

III. Approximately how much has your company spent in the last year, the last five years, and the last ten years for research and development in connection with:

(a) mining of coal
(b) gasification of coal
(c) liquefaction of coal
(d) development of oil shale
(e) development of tar sands
(f) (1) exploration, mining & milling of uranium
(2) nuclear fuel cycle
(g) nuclear reactors
(h) exploration, mining, or production of geothermal steam,
(i) solar energy.

IV. What are your company's last good faith estimates of planned or projected research and development outlays for the next five years, and for the next ten years, in connection with:

(a) mining of coal
(b) gasification of coal
(c) liquefaction of coal
(d) development of oil shale
(e) development of tar sands
(f) (1) exploration, mining & milling of uranium
(2) nuclear fuel cycle
(g) nuclear reactors
(h) exploration, mining, or production of geothermal steam
(i) solar energy.

tion is one of agency and that the general rules of law applicable to agencies apply,[4] in none of those cases was an agency principle applied to assist an attorney to avoid what would otherwise be an obligation to his client.[5] Only one court seems to have added that an attorney-client relationship arises *only* when the parties have expressly or impliedly consented to its formation. *Committee on Professional Ethics and Grievances* v. *Johnson*, 447 F. 2d 169, 174 (3d Cir. 1971). In that case, the court reversed and remanded a disbarment case on the ground of lack of adequate notice of the charges and declined to pass upon the merits. 447 F. 2d at 174, n. 8.

Of course in many respects and situations an attorney acts as a simple agent for the client, but the attorney is held to obligations to the client which go far beyond those of an agent and beyond the principles of agency, just as they transcend the legal bounds of an arms-length commercial transaction. Mr. Chief Justice (then Judge) Burger said in *Udall* v. *Littell*, 366 F. 2d 668, 675, 676 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1007 (1967):

> [A]n attorney engaged in controversy with a client in relation to a contract for professional services is in some respects in a different posture from an ordinary litigant involved in an arms length commercial transaction; as an attorney he is bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client.
>
> * * * * *

4. *Rothman* v. *Wilson*, 121 F. 2d 1000, 1006 (9th Cir. 1941); *Hensley* v. *United States*, 281 F. 2d 605, 607 (D. C. Cir. 1960); *Brinkley* v. *Farmers Elevator Mut. Ins. Co.*, 485 F. 2d 1283, 1286 (10th Cir. 1973).

5. In *Rothman*, the court of appeals affirmed a judgment in favor of clients against an attorney for fraud in obtaining secret profits in business transactions, in *Hensley*, the court held that an attorney can waive a jury trial on behalf of his client as a tactical decision; in *Brinkley*, the court held that a client was not liable under the doctrine of *respondeat superior* for the tortious conduct of his attorney which caused injury to a third party.

> The basic elements of the attorney-client relationship are not changed because the contract for services is expressed in a formal written contract. Indeed the very making of a formal contract and its performance impose a high duty on the attorney because he is dealing an an area in which he is expert and the client is not and as to which the client must necessarily rely on the attorney. . . . This is not to suggest that a formal contract is unimportant but rather that a formal long-term contract, superimposed on the normal attorney-client relationship, alters the relationship only by adding new dimensions of duties and obligations on the attorney.

For these reasons it is obvious why an attorney-client relationship does not arise only in the agency manner such as when the parties expressly or impliedly consent to its formation as the district court erroneously concluded.

The district court first determined that there existed no explicit or express attorney-client relationship in that no oil company representative requested Kirkland to act as its attorney orally or in writing and Kirkland did not accept such employment orally or in writing. The district court found that "Kirkland sent its legal bills to the API, and was compensated only by the API." 448 F. Supp. at 1301. A professional relationship is not dependent upon the payment of fees[6] nor, as we have noted, upon the execution of a formal contract.[7]

6. *Allman* v. *Winkelman*, 106 F. 2d 663, 665 (9th Cir. 1939), *cert. denied*, 309 U. S. 668 (1940) ("lawyer's advice to his client establishes a professional relationship though it be gratis"); *Fort Meyers Seafood Packers, Inc.* v. *Steptoe and Johnson*, 381 F. 2d 261, 262 (D. C. Cir. 1967), *cert. denied*, 390 U. S. 946 (1968) (attorney's fees paid by third party: "If appellant is not obligated to pay appellees for their services, it does not follow that there was no attorney-and-client relation"); *Dresden* v. *Willock*, 518 F. 2d 281, 286 (3d Cir. 1975) ("The fact that Dresden was to be paid by receiving stock in the enterprise did not change the nature of the [attorney-client] relationship"); *E. F. Hutton & Co.* v. *Brown*, 305 F. Supp. 371, 388 (S. D. Tex. 1969) (Relation of attorney and client "is not dependent on the payment of a fee").

7. *Udall* v. *Littell*, 366 F. 2d 668, 676 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1007 (1967); *E. F. Hutton & Co.* v. *Brown*, *supra* note 6, at 388.

The court then purported to determine whether the professional relationship "may be implied from the conduct of the parties." First, it found no "indicia" such as "the preparation of a legally-binding document like a contract or a will, or the attorney's appearance in a judicial or quasi-judicial proceeding." 448 F. Supp. at 1301. Second, the court searched for evidence of three fundamental characteristics of an agency relationship: the power to affect the legal relations of the principal and others; a fiduciary who works on behalf of his principal and primarily for his benefit; and a principal who has the right to control the conduct of the agent. 448 F. Supp. at 1301-03. Using these tests, the court concluded that "[v]iewed in its totality, we believe that the evidence shows that no attorney-client relationship has existed between Kirkland and the oil companies." As we have indicated, to apply only the agency tests is too narrow an approach for determining whether a lawyer's fiduciary obligation has arisen.

The district court also erroneously permitted itself to be influenced by the size of the law firm involved. In addition to identifying Kirkland as one of the largest law firms in Chicago with a two-city operation including 130 lawyers in the Chicago office and 40 lawyers in the Washington, D. C. office, the court observed that "[w]ith the modern-day proliferation of large law firms representing multi-billion dollar corporations in all segments of the economy and the governmental process, it is becoming increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests." 488 F. Supp. at 1287-88.

Although the court recognized that "where courts have found a disclosure of client information to one member of a law firm, such knowledge has traditionally been imputed to all members of his firm," it opted in this case to reject "this rigid approach, in recognition of the changing realities of modern legal practice." 448 F. Supp. at 1304.

The district court abused its discretion in applying a narrow, formal agency approach to determining the attorney-client relation and in applying a different imputation of knowledge principle in the case of a large law firm than that "traditionally" and recently applied by this circuit to sole practitioners and smaller firms. *Schloetter* v. *Railoc of Indiana, Inc.*, 456 F. 2d 706, 710 (7th Cir. 1976).

III

The client is no longer simply the person who walks into a law office.[8] A lawyer employed by a corporation represents the entity[9] but that principle does not of itself solve the potential conflicts existing between the entity and its individual participants.[10]

Three district courts have held that each individual member of an *unincorporated* association is a client of the association's lawyer.[11] In *Halverson* v. *Convenient Food Mart, Inc.*, 458 F. 2d 927, 930 (7th Cir. 1972), we held that a lawyer who had represented an informal group of 75 franchisees "[b]ecause . . . [he] in effect had represented and benefited every franchisee, ... could reasonably believe that each one of them was his client."

Here we are faced with neither an ordinary commercial corporation nor with an informal or unincorporated association, but

8. G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978) 43; J. LIEBERMAN, CRISES AT THE BAR (1978) 189.

9. "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." ABA, Code of Professional Responsibility, EC 5-18.

10. Hazard, *supra* note 8, at 46-54; Lieberman, *supra* note 8, at 189-91. The potential for conflict also exists for the lawyer for the government. Hazard, at 54; Lieberman, at 191-92.

11. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 294 F. Supp. 1148, 1150 (E. D. Pa. 1969) (privilege case); *United States* v. *American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 608, 614 (W. D. Pa. 1967) (privilege case); *Schwartz* v. *Broadcast Music, Inc.*, 16 F. R. D. 31 (S. D. N. Y. 1954).

instead with a nation-wide trade association with 350 corporate and 7,500 individual members (448 F. Supp. at 1290) and doing business as a non-profit corporation.

We need not make any generalized pronouncements of whether an attorney for such an organization represents every member because this case can and should be decided on a much more narrow ground.

There are several fairly common situations where, although there is no express attorney-client relationship, there exists nevertheless a fiduciary obligation or an implied professional relation:

> (1) The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.[12]
>
> (2) When information is exchanged between co-defendants and their attorneys in a criminal case, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants, even though that co-defendant is not the one which he represented in the criminal case. *Wilson P. Abraham Const. Corp.* v. *Armco Steel Corp.*, 559 F. 2d 250 (5th Cir. 1977) (disqualification case).
>
> (3) When an insurer retains an attorney to investigate the circumstances of a claim and the insured, pursuant to a cooperation clause in the policy, cooperates with the

12. ABA Code of Professional Responsibility, EC 4-1: "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the presentation by the lawyer of confidences and secrets of one who has employed or sought to employ him." *Cf.* MCCORMICK ON EVIDENCE (2d ed. 1972), § 88, p. 179: "Communications in the course of preliminary discussion with a view to employing the lawyer are privileged though the employment is in the upshot not accepted." *See also, Taylor* v. *Sheldon*, 172 Ohio St. 118, 173 N. E. 2d 892, 895 (Ohio Sup. Ct. 1961).

attorney, the attorney may not thereafter represent a third party suing the insured nor indeed continue to represent the insurer once a conflict of interest surfaces.[13]

(4) In a recent case, where an auditor's regional counsel was instrumental in hiring a second law firm to represent some plaintiffs suing the auditor and where the second firm through such relationship was in a position to receive privileged information, the second law firm, although having no direct attorney-client relationship with the auditor, was disqualified from representing the plaintiffs. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F. 2d 225 (2d Cir. 1977).

(5) In a recent case in this circuit, a law firm who represented for many years both the plaintiff in an action and also a corporation which owned 20% of the outstanding stock of the defendant corporation, was permitted to continue its representation of the plaintiff but was directed to disassociate itself from representing or advising the corporation owning 20% of defendant's stock. *Whiting Corp.* v. *White Machinery Corp.*, 567 F. 2d 713 (7th Cir. 1977).

In none of the above categories or situations did the disqualified or disadvantaged lawyer or law firm actually represent the "client" in the sense of a formal or even express attorney-client relation. In each of those categories either an implied relation was found or at least the lawyer was found to owe a fiduciary obligation to the laymen.

The professional relationship for purposes of the privilege for attorney-client communications "hinges upon the client's

13. ABA, Opinions of the Committee on Professional Ethics (1967 ed.), Formal Op. 247 (1942). *See also, State Farm Mutual Automobile Ins. Co.* v. *Walker*, 382 F. 2d 548 (7th Cir. 1967), *cert. denied*, 389 U. S. 1045 (1968). For general discussion of conflicts inherent in insurance matters, see H. DRINKER, LEGAL ETHICS (1953) 114-18; L. PATTERSON and E. CHEATHAM, THE PROFESSION OF THE LAW (1971) 237-40.

belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice."[14] The affidavits before the district court established that: the Washington counsel for Gulf "was given to believe that the Kirkland firm was representing both API and Gulf;"[15] Kerr-McGee's vice president understood a Kirkland partner to explain that Kirkland was working on behalf of API and also its members such as Kerr-McGee;[16] and Getty's vice president stated that in submitting data to Kirkland he "acted upon the belief and expectation that such submission was made in order to enable [Kirkland] to render legal service to Getty in furtherance of Getty's interests."[17]

A fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged.[18] The Supreme Court approved and transmitted to Congress in 1972 the Federal Rules of Evidence,[19] which included among the lawyer-client privilege rules eventually eliminated by Congress, the following definition:[20]

> A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

14. MCCORMICK ON EVIDENCE (2d ed. 1972), § 88, p. 179. *See also,* R. WISE, LEGAL ETHICS (1970) 284: "The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought."

15. Thurmond, pars. 6-8; 448 F. Supp. at 1292.

16. Hefler, para. 12; 448 F. Supp. at 1294.

17. Copley, para. 7; 448 F. Supp. at 1294.

18. Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client.* 55 BOST. U. L. REV. 61, 66 (1975).

19. Supreme Court Order, November 20, 1972.

20. Rules of Evidence for the United States Courts and Magistrates as approved by Supreme Court (West Pub. Co. 1972), Rule 503(a)(1).

The professional relationship does not arise where one consults an attorney in a capacity other than as an attorney.[21] The district court said that the Kirkland "firm's involvement was that of an expert consultant and researcher." 448 F. Supp. at 1301. The questionnaire sent to 59 oil company members of API represented to the recipients that the Kirkland firm "is acting as an independent special counsel for API."[22] The API letter employing Kirkland expressly said that "[y]our firm will, of course, act as an independent expert counsel."[23] The lobbying-type functions undertaken by Kirkland in this case are not foreign to lawyers and in fact are a common undertaking by Washington, D.C., lawyers. In soliciting confidences from API members, Kirkland did not disavow its capacity as attorneys but came expressly represented as lawyers.

The district court concluded that "the transmission by the oil companies of confidential information on their uranium industries and assets has given rise to justifiable fears that their disclosures will return to haunt them in the present litigation" and "[t]he acquired information appears to be closely related to the subject matter of the Westinghouse complaint." 448 F. Supp. at 1304. The court did not find violations of Canons 4[24] or 5[25] because it could not find an attorney-client relationship on the basis of the narrow agency rules applied. However the court did find a Canon 9[26] violation, but did not believe that such a violation alone should result in disqualification "especially in a case of the present complexity and magnitude" involving

21. McCormick on Evidence (2d ed. 1972) § 88, pp. 179-80.

22. 448 F. Supp. at 1292-93.

23. 448 F. Supp. at 1292.

24. ABA, Code of Professional Responsibility, Canon 4: "A lawyer should preserve the confidences and secrets of a client."

25. ABA, Code of Professional Responsibility, Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client."

26. ABA, Code of Professional Responsibility, Canon 9: "A lawyer should avoid even the appearance of professional impropriety."

a two-city large law firm which had attempted to segregate the substantial number of lawyers working on each matter.

The lower court perceived that "an attorney should be disqualified under Canon 9 only when 'there is a reasonable possibility of improper professional conduct' and 'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.' " 448 F. Supp. at 1304.

Although Kirkland asserted, and the district court agreed, that it constructed a "Chinese wall" between the 8 to 14 Chicago-based attorneys working for Westinghouse and the 6 D.C.-based attorneys working for API, both conceded that William Jentes, one of Kirkland's lead attorneys working on the Westinghouse antitrust complaint, in August 1976 agreed with API task force head Lea, to prepare a legal memorandum analyzing arguments which had been advanced to broaden the scope of existing antitrust laws to outlaw interlocking directorates. Lea forwarded the Kirkland memorandum to the API, which mailed it to its member-company contact officers on September 23, 1976. Despite this breach of the "wall," we do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm.[27] Here there exists a very reasonable possibility of improper professional conduct despite all efforts to segregate the two sizeable groups of lawyers.[28]

27. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706, 710 (7th Cir. 1976). *See also, Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 435 F. Supp. 84, 96 (S. D. N. Y.), *rev'd in part and aff'd in part*, 567 F. 2d 225, 229, n. 10 (2d Cir. 1977).

28. Judge Fairchild notes that he has a different view on this point. It is his understanding that on appeal, Kirkland does not rely on a Chinese wall theory. In his opinion, if it had been established that there was real insulation in all relevant particulars between the lawyers working in the Washington office on the API Report and those working in the Chicago office on the antitrust action, imputation of knowledge to all partners would be eliminated from consideration and a different result may have been appropriate.

Kirkland has argued that the oil companies were aware that Kirkland was representing Westinghouse while it was also representing API, inasmuch as Kirkland sought discovery from Kerr-McGee, Getty and abortively from Gulf, relating to the Richmond litigation, in the way of voluntary interviews, depositions and the production of documents. The point, however, is not that the oil companies were aware that Kirkland represented Westinghouse but whether the oil companies were aware that such representation would lead to Kirkland representing Westinghouse in a lawsuit in which the oil companies would be defendants. As the district court noted, "none of the [Kirkland] Washington attorneys working on the API divestiture assignment knew of the separate Westinghouse antitrust complaint until it was filed in court on October 15 [1976], after the stock exchanges closed on that day." 448 F. Supp. at 1296. If some of Kirkland's own partners were not aware of the Westinghouse antitrust complaint until it was filed, the oil companies can scarcely be presumed to have greater knowledge that it was impending with themselves as some of the defendants. It was Kirkland's duty to keep the oil companies advised of actual or potential conflicts of interest, not the oil companies' burden to divine those conflicts.

Gulf, Kerr-McGee and Getty each entertained a reasonable belief that it was submitting confidential information regarding its involvement in the uranium industry to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company. Canons 4 and 5, as well as Canon 9, apply. If Kirkland's size and multi-city status had any effect, it was in the direction of encouraging the oil companies to divulge confidential information. Whereas they might show reluctance to entrust their substantial assets and future fortunes to a sole practitioner or small law firm, Kirkland's substance and reputation would tend to comfort any apprehensions and open the lines of communication. In any event, there is no basis for creating separate disqualification

rules for large firms even though the burden of complying with ethical considerations will naturally fall more heavily upon their shoulders.

The fact that the two contrary undertakings by Kirkland occurred contemporaneously, with each involving substantial stakes and substantially related to the other, outbalances the client's interest in continuing with its chosen attorney. However, we believe that Westinghouse should have the option and choice of dismissing Gulf, Kerr-McGee and Getty from the antitrust case or discharging Kirkland as its attorney in the case. Substitute counsel has represented Westinghouse in the case since February 17, 1978, so that the impact of any change-over has been somewhat eased.

IV

The Noranda motion to disqualify Kirkland was based on an entirely different set of circumstances.

Noranda is a Canadian corporation organized under the laws of the Province of Ontario, having its principal place of business in Toronto. In 1965, Kirkland represented Noranda in the formation of a joint venture with Central Farmers Fertilizer Company, a domestic corporation centered in Chicago, Illinois. By that agreement, Noranda and Central formed a Canadian corporation to mine potash in Canada. The only possible nexus between the Central transaction and the present litigation is Noranda's belief that Kirkland may have learned the name of one of its executives, D. E. G. Schmitt, whose deposition was scheduled. The district court, finding that "[e]ven Noranda admits that Kirkland has alternate public sources of information for Schmitt's identity," found no substantial relationship between the character of a potash joint venture and a uranium price-fixing conspiracy, 448 F. Supp. at 1308.

In 1967, Kirkland, working in conjunction with Noranda's general counsel in Toronto, advised Noranda on the impact of United States' antitrust, corporation, securities and tax laws on a

proposed exchange offer involved in Noranda's abortive effort to acquire control of Essex Wire Corporation. The mechanics of the exchange required the formation of a Delaware subsidiary of the Canadian parent corporation. Kirkland organized the American subsidiary, which included the naming of three Kirkland attorneys as incorporators, the holding of the first meeting, and the election of directors. Three Kirkland attorneys studied the antitrust issues which culminated in the preparation of a "Fact Book," which analyzed the competitive impact of the prospective acquisition. Both Noranda and Essex sold copper cable and wire in the United States and Noranda was to become the supplier of Essex's considerable copper requirements.

The tender offer was aborted and on August 1, 1967, Kirkland returned to Noranda all of its personal material. Kirkland simultaneously destroyed the longhand notes of its attorneys who viewed corporate data. Kirkland has not represented Noranda on any matter since 1967.

Noranda contended that Kirkland gained access in 1965-1967 to its relationship to Noranda Sales Corporation, Ltd. and Kerr-Addison Mines Limited, the first of which tied Noranda into doing business in Illinois and the second of which is involved in the uranium industry. After an exhaustive study of the affidavits and material submitted, 448 F. Supp. at 1306-10, the district court found no substantial relationship between Kirkland's earlier representation relating to the copper industry and the presently-alleged uranium price-fixing conspiracy which did not begin until 1972. The court concluded that "the Westinghouse complaint concerns a completely different industry and a completely different time." Noranda's relation to Noranda Sales and Kerr-Addison appears in publicly-available documents, such as Noranda's annual reports and Dun and Bradstreet reports.

We do not believe that the district court abused its discretion in concluding that the more than 10-year past representations for two specific matters unrelated to the present case did not

warrant disqualification of Kirkland. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706 (7th Cir. 1976).

Judgment in Appeal No. 78-1545 is affirmed; judgments in Nos. 78-1544, 78-1546 and 78-1547 are reversed and remanded.[29]

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

29. The motions to strike appellee's brief and appendix are denied.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WESTINGHOUSE ELECTRIC CORPORATION, *Plaintiff,* *vs.* RIO ALGOM LIMITED, etc., et al., *Defendants.*	No. 76 C 3830

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Prentice H. Marshall, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Wednesday, April 19, 1978, at 2:00 o'clock p.m.

* * * * *

Mr. McGee: I received my copy of the opinion, about 9:00 o'clock last evening, and have been able to read it over several times since then.

I think it's certainly very thorough, a very careful memorandum.

I only find one major problem with it and that is that it reached the wrong conclusion.

But apart from that I have not had the opportunity of discussing it with my client at length.

I would like to request the Court for a few days continuing of the interim order regarding discovery and Kirkland's part in it to permit us to at least decide whether or not we wish to

appeal the order, and we will promptly notify Kirkland and your Honor when we have reached a decision.

The Court: Let me ask you this: I know that orders disqualifying counsel are appealable, at least in this Circuit they are.

Are orders which refuse to disqualify counsel appealable in this Circuit?

Mr. Bartlit: They are, your Honor.

The Court: Are they?

Mr. Bartlit: Yes, sir.

The Court: Okay. Without a certification or any such step on my part?

Mr. Bartlit: Yes, sir, 546 F 2d, 706 seems to take that position.

The Court: Okay. Well, I realize—the opinion took us longer than it would, and I had originally—well, the last date that I gave you was one in March, and I was really resolved to get it to you prior to today, and I thought that it would get there a few days earlier than it did.

Certainly you should have the opportunity, Mr. McGee, and all of your colleagues who were involved in the motion to discuss it with your clients.

And I am willing for a brief period of time to continue the discovery stay.

However, I do want you to know that any further stay of discovery will be granted by the Court of Appeals.

I will give you a week to decide if you think that's enough time to decide whether you are going to appeal, so that you don't — you are not caught in a total pressure situation.

* * * * *

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WESTINGHOUSE ELECTRIC CORPORATION, *Plaintiff,*
vs.
RIO ALGOM LIMITED, etc., et al., *Defendants.*
No. 76 C 3830

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Prentice H. Marshall, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday, April 24, 1978, at 9:30 o'clock a.m.

* * * * *

Mr. McGee: We did not have an opportunity, Judge, to respond to the Kirkland papers, since we received them about 9:25 yesterday morning.

I am sure that your Honor recognizes that we strenuously object to the characterizations which are set forth in those findings and conclusions.

We don't agree in any way that there is any irreparable harm and injury to Kirkland or Westinghouse here.

Discovery is proceeding in accordance with your Honor's interim orders.

The fact that these orders concerning disqualification are appealable in themselves, I believe supplies all the legal reason-

ing necessary to point out where the irreparable harm and injury lies to the person who is the losing end of the motion below, which is the reason they are appealed, and we think that their characterizations are completely inaccurate.

I am not asking for time to answer their findings of fact.

I do want to state to your Honor and to Mr. Bartlit that we will cooperate in every way possible to expedite this thing in the Court of Appeals. This is not interposed for delay. This is interposed because we think your Honor's opinion raises some very grave questions concerning the propriety of counsel's conduct which should be decided by the Appellate Court.

And it's for that reason alone that we are seeking the stay here and will seek a stay from the Court of Appeals as soon as the record is complete.

The Court: Well, I do not think for a moment, Mr. McGee, that you and your colleagues for the defense are seeking to delay the trial or other disposition of this case.

I think the questions that were presented by the motions for disqualification were important questions.

That's one of the reasons it took us as long as it did to get the job done.

* * * * *

Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-

No. 422

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

KERR-McGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, AND GETTY OIL COMPANY,
Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' OPPOSITION TO CERTIORARI

WILLIAM R. JENTES
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601

HENRY P. MONAGHAN
765 Commonwealth Avenue
Boston, Massachusetts 02138

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IN THE

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KERR-MCGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, AND GETTY OIL COMPANY,
Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' OPPOSITION TO CERTIORARI

Petitioner submits the following reply in response to the contentions raised in Respondents' Opposition to Certiorari.

POINT I

This Court Should Resolve An Important Conflict In The Circuits On Whether District Court Orders Denying Attorney Disqualification Motions Are Immediately Appealable.

Petitioner urges review of the question whether a district court order denying an attorney disqualification motion is immediately appealable as a "final decision." This is both an important issue and one on which there is need for this Court to resolve the existing conflict among the circuits. Respondents assert that petitioner somehow waived this threshold jurisdictional issue and that immediate appeal in this case was appropriate as a matter of public policy. Neither assertion has merit.

A. Petitioner Did Not And Could Not Waive Jurisdiction.

Respondents' waiver argument (pp. 10-11) is curious in the extreme. Contrary to respondents' characterization, petitioner specifically called the jurisdictional defect to the Court of Appeals' attention when it cited judicial authority contrary to, and academic criticism of, that Court's prior decision holding orders such as this immediately appealable. (Brief on Appeal p. 55)[1] The Court of Appeals rejected petitioner's jurisdictional argument when it specifically held that the order was appealable under the collateral order doctrine. (Pet. App. 54)

[1] Respondents also inaccurately suggest that Mr. Bartlit, one of petitioner's attorneys, conceded appealability during a District Court hearing and that this supposed concession "effectively prevent[ed]" respondents from pursuing other avenues of appeal. Apparently we are asked to believe that respondents and their counsel relied upon opposing counsel to protect their rights. In fact, Mr. Bartlit was simply (and accurately) stating the Seventh Circuit's doctrine of

[footnote continued on following page]

The waiver argument is even more surprising because respondents concede (p. 11) that "this Court may review jurisdiction at any time." In fact, an unbroken line of decisions holds that, because federal jurisdiction is grounded in law and cannot be conferred by consent of the parties, this Court *must* consider the question of jurisdiction *sua sponte*. E.g., *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884); *California* v. *LaRue*, 409 U.S. 109, 113 n.3 (1972).

In the next breath, however, respondents attempt to resurrect discredited waiver principles by referring to the general rule that this Court will exercise "discretion" to deny certiorari when the issue presented has not been raised below. But that doctrine does not apply to jurisdictional questions,[2] precisely because litigants cannot confer federal jurisdiction through waiver, consent, or silence. Thus, this Court will consider jurisdiction even if a party "candidly admits failure to raise the point below," *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209 (1963), or if the party himself asserted jurisdiction below, *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951), or indeed if the party actively concealed the jurisdictional defect in the lower court, *Owen Equip. & Erection Co.* v. *Kroeger*, ____ U.S. ____ n.21 (1978).

[footnote continued from preceding page]

appealability, as set forth in *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). Since *Schloetter* was binding on the District Court, absolutely no purpose would have been served by an argument to the District Judge that the Court of Appeals should reconsider its prior holding. In any event, Mr. Bartlit's statement hardly prevented respondents from seeking review by some other means. See, for example, *In re April 1977 Grand Jury Subpoenas*, No. 77-1599, ____ F.2d ____ (6th Cir. Sept. 7, 1978), in which the party who had unsuccessfully moved for disqualification filed a notice of appeal under section 1291 and sought certification under 28 U.S.C. § 1292(b). See also *IBM* v. *Levin*, 579 F.2d 271, 278 (3d Cir. 1978) (appeal and mandamus).

[2] Significantly, none of the five cases cited in support of the general rule (p. 11 n.7) was concerned with a jurisdictional question.

Jurisdictional questions concerning the immediate appealability of assertedly "final" district court orders are no exception. As this Court stated in *Liberty Mutual Ins. Co.* v. *Wetzel,* 424 U.S. 737 (1976), when vacating a court of appeals' decision on the merits because the district court order was not final within the meaning of section 1291:

> Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists. (*Id.* at 740)

See also *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962).

Respondents' related suggestion that the appealability issue is not "ripe" and that the arguments for and against have not been brought into "focus" is belied by the fact, stressed by respondents themselves, that all but one of the circuits have already ruled on the matter, albeit inconsistently.[3] The appealability of disqualification denials warrants review now, since additional lower court cases will result, as did this case, in mere citations, without analysis, of prior decisions either granting or denying appeal.

B. Denials Of Attorney Disqualification Motions Are Not Immediately Appealable.

As petitioner noted (p. 13), a clear conflict exists between those circuits which allow immediate appeal[4] and the District of

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[3] In addition, commentators have thoroughly analyzed the problem from both perspectives. *Compare,* Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts,* 45 U. Chi. L.Rev. 450 (1978), *with* Comment, *Orders Denying Disqualification of Counsel,* 30 Vand. L.Rev. 259 (1977).

[4] Petitioner also noted that some of these circuits have expressed reservations about allowing immediate appeals. (Petition p. 13 & n.14) The Sixth Circuit's recent *en banc* decision in *In re April 1977 Grand Jury Subpoenas,* No. 77-1599, ____ F.2d ____ (6th Cir. Sept. 7, 1978), adopting the government's position that denial of disqualification in a criminal case is not appealable, casts doubt, as Judge

[footnote continued on following page]

Columbia and the Ninth[5] Circuits, which do not. Respondents completely gloss over the need to resolve this conflict and to eliminate the confusion concerning this important jurisdictional issue. Respondents fail even to cite, let alone discuss, this Court's decisions in *Coopers & Lybrand* v. *Livesay,* ____ U.S. ____ (1978), *United States* v. *MacDonald,* ____ U.S. ____ (1978), and *Abney* v. *United States,* 431 U.S. 651 (1977), all of which define that "small class" of decisions appealable under the collateral order doctrine. More seriously, respondents fail even to attempt the substantive analysis required by these decisions. Other glaring deficiencies in respondents' argument warrant brief comment.

First, respondents' repeated reference (*e.g.,* pp. 11, 14) to the assertedly serious nature of the ethical questions in this particular case constitutes precisely the kind of *ad hoc* approach this Court rejected in *Coopers & Lybrand* v. *Livesay,* which held that immediate appealability depends upon whether the *category* of district court orders satisfies the collateral order doctrine, not whether individual litigants consider their cases important.

Second, by asserting that most disqualification motions are not frivolous o. filed merely for delay (p. 12), respondents suggest, without any support whatsoever, that the good faith of a disappointed movant is sufficient to transform an interlocutory order into an appealable one.

[footnote continued from preceding page]

Weick's dissent points out (Slip Op. 25-29), as to the current rule in that Circuit. A petition for certiorari in that case will be filed on or before Nov. 7, 1978.

[5] Respondents are in error (p. 12 n.9) that the Ninth Circuit has departed from its decision in *Cord* v. *Smith,* 338 F.2d 516 (1964), *clarified,* 370 F.2d 418 (9th Cir. 1966). *Trone* v. *Smith,* 553 F.2d 1207 (9th Cir. 1977), the case cited by respondents, held only that an order denying attorney disqualification is not certifiable under section 1292(b). Such a decision, by a two-judge panel, does not *sub silentio* overrule *Cord* v. *Smith,* particularly since section 1291 was not even mentioned and since the uniform practice among the courts of appeals is that prior decisions can be overruled only *en banc.*

Third, respondents assert (pp. 13-14), without reasoned discussion, that public confidence in the legal profession would be irretrievably lost if immediate appeals are not permitted. No support is adduced for this broad factual contention, the validity of which is far from obvious. As one commentator recently observed, this argument "almost surely exaggerates the public's awareness of disqualification disputes." Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L.Rev. 450, 459 (1978). Indeed, there is simply no reason to believe that a thoughtful district court opinion and a second opinion on ultimate appeal are insufficient to maintain public confidence in the bar. In fact, immediate appealability may foster public cynicism to the extent it encourages further use of disqualification motions as a litigation tactic. In all events, however, "[s]uch policy arguments, though proper for legislative consideration, are irrelevant to the issues [this Court] must decide." *Coopers & Lybrand* v. *Livesay*, ___ U.S. ___ (1978).

POINT II

The Court Of Appeals Adopted An Unprecedented Conflict Of Interest Standard.

Respondents assert (p. 15) that petitioner has "substantially mischaracteriz[ed]" the Court of Appeals' holding in an effort to portray it as "unprecedented." They say the Court of Appeals' conclusion that a lawyer-client relationship existed rested upon "Kirkland's conduct, not simply [respondents'] 'belief' alone." Yet the only "conduct" adverted to is Kirkland's receipt of information from respondents as part of Kirkland's representation of a trade association with thousands of members.

Contrary to respondents' contention, the District Court recognized, and petitioner agrees, that an attorney-client relationship can be established by implied, as well as express, consent and that consent "may be implied from the conduct of the parties."[6] The fact that Kirkland obtained *some*[7] confidential information from respondents in its representation of a trade association is, of course, a factor to be considered in determining whether a lawyer-client relationship had been established. The District Court was well aware of that fact, gave it careful consideration (Pet. App. 30-31), and found, on *all* the evidence, that no professional relationship existed.

The Court of Appeals formulated a far different standard, one which makes any form of an attorney's consent irrelevant. Under the Court's analysis, an attorney-client relationship is established whenever the putative client submits confidential information in what is later asserted to be a belief that the recipient was acting as his lawyer. The consent—even the knowledge—of the attorney is irrelevant. The focus is *entirely* upon the putative client, and the "reasonable belief" of that "client" suffices to impose on the attorney the full range of duties inherent in the attorney-client relationship. The Court's holding is, as we have urged (pp. 17-22), not only wholly unprecedented but one which, because of its consequences, warrants plenary review hereof.

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[6] The Court of Appeals quotes this language from the opinion of the District Court. (Pet. App. 66)

[7] Respondents' statement of facts creates the impression that Kirkland had contact only with them and that they spent much of the time providing confidential information. The facts are far different, as the District Court set out at length. (Pet. App. 8-16) Kirkland represented a large trade association, during which time it surveyed many of the members by questionnaire and by interview. In the course of this survey the respondents provided confidential statistical information which was later returned without disclosure.

POINT III

The Court Of Appeals Improperly Invaded The Province Of The District Court.

Respondents assert (p. 17) that this is not a case in which the Court of Appeals ignored the District Court's findings of fact, but simply one in which it applied a different legal standard to undisputed facts. Quite the contrary, the Court of Appeals repeatedly stated that respondents had a "reasonable belief" (Pet. App. 53, 70, 73) that Kirkland was representing them, despite findings of fact by the District Court which essentially refute the genuineness and reasonableness of the asserted belief. Because the District Court quite properly considered all the evidence, including the parties' *contemporaneous* expressions and conduct, it was not called upon to rule specifically on the veracity of respondents' after-the-fact assertions. However, the District Court's exhaustive discussion of the objectively verifiable facts substantially undermines, if not flatly contradicts, respondents' litigation affidavits. Absent an opportunity for the District Court to specifically rule on the truth of the litigation affidavits, the Court of Appeals should not have treated the affidavits as dispositive.

Respondents' final contention is that the Court of Appeals properly ordered disqualification. The argument is simply asserted (p. 18) with unexplained reference to ***IBM*** v. ***Levin***, 579 F.2d 271, 282-283 (3d Cir. 1978), and ***Emle Industries, Inc.*** v. ***Patentex, Inc.***, 478 F.2d 562, 570-571 (2d Cir. 1973). Neither case, however, held that disqualification is invariably required in multiple representation cases, and in fact the Third Circuit affirmed disqualification in ***IBM*** on the ground that the district court had not abused its discretion. *Id.* at 283. ***Emle Industries*** contained no discussion of the standard of review, but subsequently the Second Circuit expressly noted that it had no occasion to determine whether disqualification is mandatory in every case. ***Cinema 5, Ltd.*** v. ***Cinerama, Inc.***, 528 F.2d 1384, 1387 (2d Cir. 1976). Perhaps in "standard" instances of an attorney's multiple representation of *known* clients, disqualification is an acceptable remedy[8] if there are no other countervailing considerations. In this case, however, the District Court found that the ethical facts fall into a gray area, the Court of Appeals conceded the "novel[ty]" of the questions presented, and not even respondents contend that Kirkland knew of its alleged attorney-client relationship with them. Moreover, despite respondents' repeated efforts to obscure the fact (pp. 8-9, 20), the District Court expressly recognized the public importance of Kirkland's continued representation of petitioner. In these circumstances, unless the District Court in fact had no discretion whatever and disqualification is always automatic, the Court of Appeals plainly usurped the District Court's prerogatives.

[8] This seems to be the assumption of both the Second and Third Circuits. Whether that rule is too rigid is itself an important question, but one which need not be addressed here.

CONCLUSION

Respondents have failed in their attempt to discount the importance of the questions presented in the petition. Indeed, the very arguments advanced by respondents underscore the need to resolve the conflict among the circuits on the threshold jurisdictional issue, the need for this Court to resolve whether an attorney-client relationship can be imposed absent the lawyer's knowledge or express or implied consent, and the need to preserve the district courts' prerogative in ethical disputes to find facts and fashion relief. Review of these issues is especially appropriate in this instance, where petitioner's chosen and well prepared counsel has been excluded from an antitrust case which itself is of nationwide significance. Consequently, for the reasons stated in the petition, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

October 18, 1978

Respectfully submitted,

WILLIAM R. JENTES
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

HENRY PAUL MONAGHAN
765 Commonwealth Avenue
Boston, Massachusetts 02138
(617) 353-3812